No. 45709-1-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION TWO

In re Personal Restraint of:

GEORGE P. WOODARD,

Petitioner.

Response to Personal Restraint Petition

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

By: _____
SARA I. BEIGH, WSBA No. 35564
Senior Deputy Prosecuting Attorney

Lewis County Prosecutor's Office
345 W. Main Street, 2nd Floor
Chehalis, WA 98532-1900
(360) 740-1240

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Federal Cases

Washington Statutes

Constitutional Provisions

Other Rules or Authorities

APPENDIXES

Appendix A - Judgment and Sentence

Appendix B – Unpublished Opinion, COA No. 40293-9-II

Appendix C – Washington State Patrol Crime Laboratory Report Laboratory No. 509-000053, Dated 4/29/09

Appendix D – Amended Information

Appendix E – Cover Letter From Dr. Deborah Hall

Appendix F – Curriculum Vitae of Lisa Wahl, ARNP, FNP, NP-C

Appendix G – Appellant's Opening Brief, COA No. 40293-9-II

I. AUTHORITY FOR PETITIONER'S RESTRAINT

The State of Washington is the Respondent in this matter. Petitioner, George P. Woodard, is restrained by authority of the judgment and sentence of the Lewis County Superior Court under cause number 08-1-00876-7. A copy of the judgment and sentence is attached to this petition as Appendix A.

II. RESPONSE TO PETITIONER'S CLAIMED GROUNDS FOR RELIEF

A. Woodard's convictions were not obtained as a result of improper opinion testimony by an expert State witness and therefore, Woodard's right to a fair trial and impartial jury was not violated.

B. The trial was not rendered fundamentally unfair because the trial judge did not impermissibly comment on the evidence during the preliminary instruction to the jury.

C. The trial judge did not display actual or apparent bias towards Woodard.

D. Woodard's convictions were not obtained through the admission of inadmissible evidence.

E. Woodard was not denied his right to compulsory process.

F. Woodard was not denied his right to confront and examine witnesses.

G. Woodard received effective assistance from his trial counsel throughout the pendency of his case.

H. Woodard received effective assistance from his appellate counsel.

I. There is no cumulative error warranting dismissal.

III. STATEMENT OF THE CASE

The facts set out in the FACTS section of the unpublished Court of Appeals decision gives an accurate account of the case. Appendix B, pages 2-5.

Woodard timely filed this petition and brief on December 5, 2013. The State will further supplement the facts and record as necessary in its argument below.[1]

IV. ARGUMENT

A. WOODARD'S RIGHT TO A FAIR TRIAL AND AN IMPARTIAL JURY WAS NOT VIOLATED BY IMPROPER OPINION TESTIMONY OF LISA WAHL.

Woodard argues that his right to a fair trial and impartial jury were violated by the testimony of Lisa Wahl, a sexual assault clinic nurse. Petition at 4-20. Woodard argues three snippets of Ms. Wahl's testimony were improper by offering a legal opinion, citing to a study, and rendering an opinion regarding Woodard's guilt, which invades the province of the jury. *Id.* Woodard mischaracterizes the circumstances and implications of some of Ms. Wahl's testimony. Further, if there was any error, it was harmless.

[1] The State has reorganized the argument portion and combined all of the ineffective assistance of trial counsel claims under one section and separated out the issues presented in subsections 7(a) and 7(b) into two separate sections. The State maintains throughout its briefing that Woodard is not entitled to relief under any of the issues he presents to this Court.

1. Standard of Review.

A constitutional issue raised for the first time in a collateral attack will only be addressed on its merits if the petitioner can demonstrate that the alleged error gave rise to actual prejudice. *In re Cook*, 114 Wn.2d 802, 813, 792 P.2d 506 (1990). If the alleged error is not a constitutional issue the appellate court will only reach the merits "when the claimed error constitutes a fundamental defect which inherently results in a complete miscarriage of justice." *Id.*

2. This Court Should Not Reach The Merits Of The Issue Because Woodard Cannot Show That The Claimed Error Gave Rise To Actual Prejudice.

A criminal defendant has a constitutional right to a fair trial by an impartial jury. U.S. Const. amend VI; U.S. Const. amend XIV; Const. art. I, § 3; Const. art. I, § 21; Const. art. I, § 22. "The right to a fair trial includes the right to the presumption of innocence." *State v. Gonzalez*, 129 Wn. App. 895, 900, 120 P.3d 645 (2005) (citations omitted). The presumption of innocence is the "bedrock foundation in every criminal trial." *Gonzalez*, 129 Wn. App. at 900, citing *Morissette v. United States*, 342 U.S. 246, 275, 72 S. Ct. 240, 96 L. Ed. 288 (1952). The trial court has a duty to be alert to any factor which "could undermine the fairness of the fact-finding

process." *Id.* Woodrow couches all of his arguments in this section as Constitutional violations, therefore the State will respond in kind.

a. Ms. Whal's testimony citing to a study of pregnant teenage girls was admissible testimony from an expert witness.

An expert witness, whether professional or lay, may give testimony in the form of an opinion when his or her "specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." ER 702. An expert's scientific or technical testimony must be based upon a scientific principle or explanatory theory that has gained general acceptance in the scientific community. *State v. Black*, 109 Wn.2d 336, 342, 745 P.2d 12 (1987), *citing Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923). This standard, or test, is commonly referred to as the *Frye* test or *Frye* rule. "However, if expert testimony does not concern novel theories or sophisticated or technical matters, it need not meet the stringent requirements for general scientific acceptance." State v. Jones, 71 Wn. App. 798, 815, 863 P.2d 85, (1993), *citing State v. Ortiz,* 119 Wn.2d 294, 310-11, 831 P.2d 1060 (1992).

Woodard argues Lisa Wahl, a nurse practitioner at the sexual assault clinic, testified in regards to a scientific study without first establishing that study's scientific acceptance or giving any

foundational information regarding the study, thereby violating his right to a fair trial and an impartial jury because the testimony was inadmissible. Petition at 14-15.[2] The testimony at issue was during the State's redirect examination of Ms. Wahl. 5RP 23.[3] On cross-examination Ms. Wahl was asked if M.P.'s exam was normal and she said it was and there were no physical indications of rape.[4] 5RP 22. On redirect the following exchange occurred:

> Q. When you talked about with Mr. Blair indications of rape, is it possible to have sexual intercourse without any injuries being inflicted?
>
> A. Certainly.
>
> Q. Is it possible for somebody to perform oral sex on a woman and not leave any injuries?
>
> A. Certainly.
>
> Q. Is possible to have actual penile penetration without any injuries?
>
> A. Yes. In fact, they have done a study, where they had 37 pregnant teenage girls and all but three had normal findings and it's fairly obvious that something happened.
>
> Q. What do you mean by normal findings?

---

[2] Woodrow also alleges this testimony was improper testimony from an expert because she was voicing her opinion of his guilt. Petition at 15-16. The State will address that argument in subsection 'b' below.

[3] There are six volumes of the trial proceedings, which are numbered I-V, with volume II having a part 1 and a part 2 (the afternoon portion of the second day of trial was done by a different court reporter). The state will refer to the report of proceedings for the trial as 1RP, 2.1RP, 2.2RP, 3RP, 4RP, and 5RP.

[4] The State will refer to the victim by her initials.

A. Normal findings would be normal variant, normal findings, nonconclusive, no diagnosis of blunt penetrating trauma.

Q. To what parts of the body are you referring?

A. To the hymen. It's normal to be normal.

5RP 23. Woodard's argument centers around the unobjected to testimony regarding the study of pregnant teenage girls. Petition 14-16. The testimony was admissible, and if there was a lack of foundation for the testimony a timely objection would have allowed the State to elicit the proper foundation from Ms. Wahl. Further, as argued in a section below, any error would be harmless.

Ms. Wahl was testifying in her capacity as an expert and her credentials as an expert are not challenged by Woodard. The deputy prosecutor was raising a hypothetical question, if it was possible to have penile penetration without any injuries, and Ms. Wahl's answer was yes. 5RP 23. Ms. Wahl goes on to explain about the study of the 37 pregnant teenage girls. This information is helpful for the trier of fact as some may not know it is possible to have penile vaginal intercourse without injuring or breaking the hymen. ER 702. The example given by Ms. Wahl regarding the study goes to explaining, at least in part, why Ms. Wahl gave the answer she did. There is nothing in the record that would lead a

person to believe that the scientific principle, that a woman could be vaginally penetrated without injury to her hymen, was a novel scientific principle or explanatory theory that had not gained general acceptance in the scientific community. *See Black*, 109 Wn.2d 342. Woodard's argument is a foundational objection to the evidence, that the State did not establish the necessary foundation for the testimony to be admissible. But there was no objection to the testimony and Woodard provides no evidence in his petition that the proffered testimony did not meet the *Frye* requirements.

It is Woodard's burden to show the testimony was inadmissible. In a personal restraint petition, petitioner bears the burden of showing prejudicial error. *In re Gronquist*, 138 Wn.2d 388, 396, 978 P.2d 1083 (1990); *State v. Brune*, 45 Wn. App. 354, 363, 725 P.2d 454 (1986); *In re Monschke*, 160 Wn. App. 479, 489, 251 P.3d 884 (2010). Bare allegations unsupported to citation to authority, references to the record, or persuasive reasoning cannot sustain this burden of proof. *Brune*, 45 Wn. App. at 363. The petitioner must support the petition with the facts upon which the claim of unlawful restraint rests, and he may not rely solely on conclusory allegations. *In re Cook*, 114 Wn.2d 802, 813-14, 792 P.2d 506 (1990); *Monschke*, supra, 160 Wn. App. at 488; RAP

16.7(a)(2)(i). When the allegations are based on matters outside the existing record, the petitioner must demonstrate that he has competent, admissible evidence to establish the facts that entitle him to relief. *Monschke* at 488; *In re Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992). If the petitioner fails to make this threshold showing then he cannot bear his burden of showing prejudicial error. *Monschke*, supra, at 489.

Woodard does not meet his burden. He provides no evidence that there was anything objectionable about the proffered testimony, that it was scientifically unsound, or novel. Woodard does also argue ineffective assistance of counsel for failing to object to the testimony, among a number of other arguments in support of his ineffective assistance of counsel claims. The State will respond to those arguments in section G below. There was no error and therefore no prejudice.

b. Ms. Wahl did not give an improper opinion regarding Woodard's guilt while testifying.

"An expert opinion is not objectionable merely because it 'embraces an ultimate issue to be decided by the trier of fact.'" *State v.* Hudson, 150 Wn. App. 646, 652, 208 P.3d 1236 (2009), *quoting* ER 704. Generally a witness may not give an opinion, while testifying, of the veracity or guilt of a defendant. *State v. King*, 167

Wn.2d 324, 331, 219 P.3d 642 (2009). This rule applies to both lay and expert witnesses. *King*, 167 Wn.2d at 331. The reason for this rule is "such testimony is unfairly prejudicial to the defendant because it invades the exclusive province of the jury." *Id.* (internal quotations and citations omitted). The reviewing court will consider a number of factors and circumstances to determine if there was impermissible opinion testimony, "(1) including the type of witnesses involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact." *Id.* at 332-33.

Woodard argues that Ms. Wahl gave impermissible testimony regarding an opinion that he was guilty on two occasions. Petition at 14-17. Woodard argues that Ms. Wahl's testimony regarding the study of 37 pregnant teenagers was improper opinion testimony regarding his guilt. Petition at 14-16. The second instance Woodard argues was an improper opinion testimony regarding his guilt was at end of the State's redirect where Ms. Wahl made a comment that she would not call the sex described by M.P. as sex, but as victimization. Petition at 16-17; 5RP 24. Neither instance Woodard complains of is improper opinion testimony regarding Woodard's guilt.

The exchange between the deputy prosecutor and Ms. Wahl when she speaks of the study did not infer that Ms. Wahl was opining Woodard's guilt. See 5RP 23. Woodard in his petition completely mischaracterizes the testimony. Petition at 15-16. Woodard argues that Ms. Wahl was in essence telling the jury "'This study I know about had 34 [sic] pregnant teenage girls with 'normal' hymenal findings but they obviously had intercourse because they got pregnant, so M.P. must have had intercourse with George Woodard because she also had 'normal' hymenal findings.' Ms. Wahl's calculated comment had only one purpose: to convince the jury of Mr. Woodard's guilt." Petition at 15-16. The testimony was to give a concrete example of how normal findings can happen when you know that sexual intercourse likely occurred, because, while remotely possible to become pregnant without penetration, the most common way a woman becomes pregnant is through vaginal penile intercourse. Woodard is attempting to read more into the testimony in a desperate attempt to fight his life sentence. This was not improper testimony opining Woodard's guilt.

The second instance of testimony was also during the deputy prosecutor's redirect. The testimony occurred as follows:

> Q. So in your opinion, it would be possible for her to have sex as she described and not see any physical signs, correct?
>
> A. Well, I wouldn't call it sex. I would call it victimization, but, yes, that's true.

5RP 24. Ms. Wahl did not state that Woodard was guilty of raping or kidnapping M.P. 5RP 24. Ms. Wahl's statement, while admittedly an opinion regarding the description of the sexual encounter as described to Ms. Wahl by M.P., did not infer that Ms. Wahl was opining that Woodard raped M.P. The statement was in regards to the physical contact pursuant to the information self-reported by M.P. Ms. Wahl's testimony was clear throughout her time on the stand, M.P's medical history was consistent with being raped, as that was what M.P. reported, but the physical findings were inconclusive and was equally consistent with a person who had blunt penetrating trauma and a person who had no sexual contact. See RP 9-25.

There was no improper testimony from Ms. Wahl opining Woodard's guilt. If there was any error it was harmless and not prejudicial, as argued below.

c. Ms. Wahl's testimony giving a legal definition of rape was improper.

Woodard argues Ms. Wahl impermissibly testified regarding the definition of rape, a legal term, thereby giving an improper legal conclusion. Petition at 11-14. The State concedes that Ms. Wahl's testimony gave an improper legal conclusion: "On that spectrum of normal and diagnostic blunt trauma you have levels of normal variance to inconclusive to very concerning to diagnostic. A notch is considered a normal variance and it could or could not indicate blunt penetrating trauma, which as the legal term is called rape." 5RP 14. A witness may not give legal conclusions in his or her testimony. S*tate v. Olmedo*, 112 Wn. App. 525, 532, 49 P.3d 960 (2002). "Improper legal conclusion include testimony that a particular law applies to the case, or testimony that the defendant's conduct violated a particular law." *Olmedo*, 112 Wn. App. at 532.

It can be inferred from Ms. Wahl's testimony that the definition she gives as to rape is the legal definition in this case, which would be improper. This error is harmless, which the State will argue below, and no prejudice resulted, therefore this Court should not reach the merits of the claim.

3. If There Was Error, It Was Harmless Beyond A Reasonable Doubt.

With the exception of the conceded error regarding an improper legal conclusion, the State is not agreeing that any other error occurred during Ms. Wahl's testimony. Arguendo, if any error occurred it was harmless.

When there is an error of constitutional magnitude, prejudice is presumed and it is the State's burden to prove the error was harmless beyond a reasonable doubt. *State v. Coristine*, 177 Wn.2d 370, 380, 300 P.3d 400 (2013) (citations omitted). A constitutional error is harmless if the reviewing court is "convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt." State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996) (citation omitted).

The testimony from the trial and the physical evidence leave no doubt that any error is harmless beyond a reasonable doubt because the untainted evidence was so overwhelming it would necessarily lead to a finding of guilt. M.P. gave detailed testimony regarding the facts surrounding her encounter with Woodard prior to any sexual contact occurring. 2.1RP 123-25, 2.2RP 5-21. M.P.

explained they left for the Pearl Street Market at 7:51 p.m. and she had to hurry because the store was closing early at 8:00 p.m. because it was Christmas Eve. 2.2RP 15-16. M.P. testified she went into the store, purchased a peanut butter cup while Woodard stayed in the van. 2.2RP 5, 16. M.P. stated there was one other customer in the store while she was there. 2.2RP 16. M.P. could even testify as to which parking spot Woodard parked in. 2.2RP 16.

M.P. explained that she thought they were heading back to the trailer park but Woodard went on an indirect route, ending at a dead end road, Lowery Lane. 2.2RP 17-21. Woodard did a donut in the van, it was snowy and icy, and then told M.P. to get in the backseat. 2.2RP 21. M.P. testified,

> He says, "Just get in the back." And I get in the back. He tells me to pull my pants down. And I say, "No, why?" And he said, "Pull your pants down now, bitch." And I said, "Okay."

2.2RP 22. M.P. explained she did what Woodard told her to because he said it in an angry, mean voice and she was scared that he would hurt her. 2.2RP 22. M.P. was a twelve year old little girl when this incident occurred. 2.1RP 122. Woodard was a 43 year old family friend. 2.1 RP 123, 5RP 37. M.P. testified she was wearing blue jeans, a blue hoody sweatshirt, a shirt underneath that said "love me forever", and a pair of panties. 2.2RP 23.

M.P. explained that she pulled her pants and panties down to her knees and Woodard pulled them down to her ankles and pulled his own pants down. 2.2RP 23. M.P. testified that Woodard told her he "was going to eat me out." 2.2RP 24. M.P. graphically recalled how Woodard licked around the outside of her vagina and put his fingers inside of her vagina. 2.2RP 25. M.P. said Woodard put his mouth on what she believes was her left breast. 2.2RP 26, 54. M.P. explained that Woodard tried to make her perform oral sex on him by putting his penis up to her chin. 2.2RP 27. Woodard then said, "Fine. I'll just have sex with you." 2.2RP 27. M.P. testified Woodard then put his penis inside of her vagina, moving it in and out, which hurt. 2.2RP 27-28. M.P. was unsure if Woodard used a condom but did state Woodard did not ejaculate and she did not know if he wore a condom because she did not look. 2.2RP 28. When it was over Woodard told M.P. if anyone asked what took so long she was to say that there was a long line at the store because it was about to close. 2.2RP 41. The drive to the store should only take about three minutes each way. 2.1 RP 80, 5RP 39. According to M.P. the incident lasted for approximately 25 minutes. 2.2RP 25, 29.

M.P. did not want to stay at the trailer so she went to a friend's house and eventually told her friend what had happened and the friend called M.P.'s mom. 2.2RP 44-45, 47-48. The police were called and M.P. handed over the bag of clothes she had worn on Christmas Eve to Deputy Shannon. 2RP 49-52. M.P. identified the blue hoody she had worn as identification 16. 2.2RP 54. M.P. went to Centralia Providence Hospital where she was examined. 2.2RP 59-60.

Dallas Hazelrigg was M.P.'s step-father. 2.1RP 76-77. Mr. Hazelrigg left the trailer with his brother right after M.P. and Woodard headed to the store. 2.1RP 83. Mr. Hazelrigg and his brother went to a house to purchase drugs and try to buy a chainsaw. 2.1RP 83. It took them longer than normal because the people at the place they went were asking Mr. Hazelrigg's brother a bunch of questions about just getting out of jail on drug charges. 2.1RP 83-84. Mr. Hazelrigg testified that they were gone for at least 30 minutes. 2.1RP 84. M.P. and Woodard were not back from the store when Mr. Hazelrigg and his brother arrived back at the trailer. 2.1RP 85. Woodard and M.P. returned to the trailer within five minutes of Mr. Hazelrigg returning. 2.1RP 85. Paula Loreman also testified Woodard and M.P. were gone for approximately 30

minutes. 2.1RP 21-22. M.P.'s mother, W.G.[5] also testified M.P. and Woodard were gone for about 20 to 35 minutes. 3RP 17.

The emergency room doctor, Dr. Sunderland, testified that M.P.'s vagina was swollen and tender outside the vaginal vault. 4RP 47. Dr. Sunderland said M.P.'s hymen was not intact and it was quite tender upon examination.[6] 4RP 47. Dr. Sunderland saw signs of vaginal trauma and a small amount of bloody discharge in the back of M.P.'s vagina which can be caused by trauma or infections. 4RP 48. M.P. was tested for infection and none was found. 4RP 51. Dr. Sunderland also acknowledged on cross-examination that it was possible that he made a mistake when examining M.P. and her hymen could have been intact. 4RP 58.

The blue hoody sweatshirt, worn by M.P. when she went to the store with Woodard, was tested for DNA. 2.2RP 23, 47, 52, 3RP 61-62, 4RP 34, 128-30; Ex. 15. The blue hoody was also tested for amylase, which is found in high levels in saliva but also found in other bodily fluids. 4RP 129. The hoody was positive for amylase, particularly in the left chest area. 4RP 129; Pet. App. H,

[5] The State will also refer to the victim's mother by her initials to protect the victim's privacy.

[6] The State acknowledges Dr. Sunderland's opinion regarding M.P.'s hymen differed from Ms. Wahl's opinion, which was explained in greater detail above.

page 2.[7] DNA was found in the cuttings removed from where the amylase was found, which was detected in an oval pattern on the left chest area. 4RP 130; Pet. Ap. H, page 2. Woodard was positively identified as the contributor of the DNA on the left chest area of the sweatshirt. 4RP 131-35; Pet. Ap. H, page 2, 4; Appendix C. The estimated probability of the DNA belonging to another person from the U.S. population was one in 15 quadrillion. Appendix C.

The State also had two people testify who had been in the Lewis County Jail with Woodard. James Barnes was in the same protective custody/lockdown area as Woodard while Mr. Barnes waited to be sent off to prison. 4RP 62. Mr. Barnes received no leniency for his testimony and received no offers from the State for his testimony. 4RP 68. Woodard asked Mr. Barnes questions about DNA. 4RP 63. Woodard indicated to Mr. Barnes, through a lewd gesture of placing his tongue between his two fingers, that he had oral sex with M.P. 4RP 64. Woodard told Mr. Barnes he had not had a condom so he had oral sex with M.P. 4RP 64. Mr. Barnes denied speaking to Jonathan Neff about Woodard's case. 4RP 77.

[7] The State will cite to the Petitioner's Appendices as Pet. Ap. and the letter of the appendix. This is done in an attempt to not be duplicative in the submitting of documents to this Court.

Jonathan Neff was housed at the Lewis County Jail with Woodard from January 10, 2009 to February 13, 2009. 4RP 77. Woodard asked Mr. Neff about DNA evidence, in particular vaginal fluid and saliva on a van seat. 4RP 78. Mr. Neff testified that Woodard told him he digitally penetrated the girl and had oral sex with her. 4RP 79. Mr. Neff explained that Woodard made a gesture with his fingers and tongue to indicate oral sex. 4RP 79. Mr. Neff also testified that he did not receive a deal from the State for his testimony in Woodard's case. 4RP 79.

The untainted evidence was so overwhelming it necessarily leads to a finding of guilt. *Easter*, 130 Wn.2d at 242. Woodard took M.P. to the store. They were gone far longer than necessary to go to the store and purchase candy. Woodard told people he was in jail with that he had oral sex with M.P. and digitally penetrated her, which corroborates the testimony given by M.P. Further, Woodard's DNA was found on the left chest area, the place where M.P. testified Woodard kissed her breast, of the jacket M.P. was wearing the night of the rape. Any error committed was therefore harmless, no prejudice resulted, therefore this Court should not reach the merits and Woodard has not met his burden. This Court should dismiss the petition.

B. WOODARD'S ASSERTION THAT HE DID NOT RECEIVE A FAIR TRIAL IS INCORRECT BECAUSE THE TRIAL JUDGE DID NOT IMPERMISSIBLY COMMENT ON THE EVIDENCE DURING THE PRELIMINARY INSTRUCTION TO THE JURY.

Woodard argues a statement made by the judge as part of his preliminary instructions to the jury, admonishing the jurors from viewing the places where the alleged crimes had been committed, was an impermissible comment on the evidence warranting granting of his petition and reversal of his convictions. Petition at 23-22, 26-27, 29-31, 35. Judge Brosey's comment was not an impermissible comment on the evidence and Woodard's claim fails.

1. Judge Brosey's Preliminary Instruction To The Jury Was An Admonishment To The Jury To Not Seek Out Evidence In An Attempt To Preserve Woodard's Right To A Fair Trial, Not An Impermissible Comment On The Evidence.

A judge is prohibited from instructing a jury in regards to a matter of fact. Const. art. IV § 16. A claim that the judge impermissibly commented on the evidence may be raised for the first time on appeal. *State v. Levy*, 156 Wn.2d 709, 719-20, 132 P.3d 1076 (2006). A statement is considered a comment on the evidence when the judge's "attitude towards the merits of the case or the court's evaluation relative to the disputed issue is inferable from the statement." *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d

929 (1995). When determining if the trial judge's remark constitutes a comment on the evidence the "reviewing courts evaluate the facts and circumstances of the case." *State v. Sivins*, 138 Wn. App. 52, 58, 155 P.3d 982 (2007). If a trial court's statement is deemed to be a comment on the evidence then it is presumed to be prejudicial. *Lane,* 125 Wn.2d at 838. The State has the burden of showing the defendant was not prejudiced by the judge's comment unless the record affirmatively reflects that no prejudice resulted. *Id.* A judge's comment on evidence, unless deemed harmless, is reversible error. *Id.* at 393.

In *Lane* the trial court read a statement to the jury regarding the reason for a witness's early release from jail. There was testimony regarding why the witness was released from jail, but it was a disputed issue of fact. The court found that by making the statement to the jury regarding the reason for the witness's early release the trial court was expressly conveying an opinion as to the evidence and thereby charging the jury with a fact. *Lane*, 125 Wn.2d at 839.

The trial court judge did not comment on the evidence during his preliminary comments/instructions to the jury. Prior to testimony being taken Judge Brosey released the jury for the day and gave a

number of instructions which were designed to safeguard the trial process and explain how the proceeding would take place. 1RP 105-14. As part of the preliminary instructions Judge Brosey told the jurors:

> There may be some evidence that certain things happened at a particular location. You may know where that location is. You may go near it or by it going to or from the Law and Justice Center or perhaps over the weekend or during a long recess. If that's the situation don't stop to look things over, because the conditions may not necessarily be the same as they were when all the actions took place that led to the charges being filed.

1RP 107. Woodard complains the following language was a comment on the evidence, "as they were when all the actions took place that led to the charges being filed." Petition at 30-31, 34. Woodard insists that the language conveys that the judge believed Woodard was guilty of the charges because the actions took place. *Id.* Woodard is distorting the statement, failing to read the statement in its entirety, and mischaracterizing the impact of the words. The words simply are an admonishment to not stop and investigate the areas that the witnesses will testify about. Obviously some actions are alleged to have occurred, and Woodard's own testimony confirms that he at a minimum took M.P. to the Pearl Street Market. 5RP 32-35.

The trial court's statement does not meet the definition of a comment on the evidence. According to *Lane,* the trial court comments must be inferred as an evaluation of a disputed fact or display the trial court judge's attitude regarding the merits of the case. *Lane*, 125 Wn.2d at 838. In Woodard's case the trial court judge was not making a comment regarding a disputed fact or display his attitude regarding the merits of the case. There was no impermissible comment on the evidence and Woodard's argument to the contrary fails.

2. If Judge Brosey's Preliminary Instruction Is Found To Be An Impermissible Comment On The Evidence, It Is Clear From The Record The Comment Was Not Prejudicial To The Outcome Of Woodard's Case And Therefore It Is Harmless Error.

Even assuming, arguendo, that there was an impermissible comment on the evidence by Judge Brosey, the comment is harmless because Woodard was not prejudiced by the comment.

The trial court gave the standard jury instruction that commands jurors disregard any apparent comment on the evidence by the trial judge and a jury is presumed to follow the jury instructions. *State v. Hana*, 123 Wn.2d 704, 710, 871 P.2d 135 (1994); WPIC 1.02; Pet. Ap. E, page 2. As argued above, there was overwhelming evidence of Woodard's guilt. The trial court's brief

statement, "because conditions may not necessarily be the same as they were when all the actions took place that led to the charges being filed", without more, does not prejudice Woodard in this matter and is harmless error. Woodard has not met his burden in this petition and the petition should be dismissed.

C. WOODARD RECEVED A FAIR TRIAL BECAUSE THE TRIAL JUDGE'S RULINGS AND ACTIONS DID NOT DISPLAY APPARENT OR ACTUAL BIAS AGAINST WOODARD OR HIS TRIAL COUNSEL.

Woodard claims that Judge Brosey exhibited actual bias against him throughout the trial proceedings. Petition at 22-35. Woodard argues 10 different incidents which he believes evidence the judge's bias against him:

1. Denial of a mistrial for the alleged erroneous preliminary instruction.

2. Denial of a motion to dismiss based on Deputy Shannon's testimony allegedly exceeding the scope of the CrR 3.5 motion.

3. The judge allowed Mr. Neff and Mr. Barnes to violate pretrial motions limiting their testimony. Woodard takes issue with,

> (a) the denial of his motion to dismiss and/or mistrial for Mr. Barnes testimony regarding uncharged sexual acts and telling Mr. Blair to be quiet during the motion,
> (b) the denial of the motion to dismiss and/or mistrial for when Mr. Neff testified Woodard had consumed crack, and
> (c) the denial of three separate requests for a mistrial based upon Mr. Neff and Mr. Barnes' misconduct for "knowingly and intentionally testify to the uncharged sexual incidents and prior drug use."

4. Denial of defense counsel's motion at the close of the State's case, commonly referred to as a half time motion, for failing to make a prima facie showing.

5. Denial of the defense counsel's motion at the conclusion of the case to dismiss the Kidnapping charge.

6. The judge overruled all the objections made by defense during the State's closing.

7. The judge sustained six objections made by the deputy prosecutor regarding argument of facts not in evidence during defense counsel's closing argument.

8. The judge denied defense counsel's motion to dismiss based on the judge overruling all of defense counsel's objections and sustaining all of the deputy prosecutor's objections during closing arguments.

9. The alleged comment on the evidence during the preliminary instruction argued above.

10. At the sentencing hearing the judge stated, "I'm trying this case."

Petition 22-26.

Reviewing the rulings and statements made by the judge in the context of the entire record, the judge did not violate the appearance of fairness doctrine. The judge made the appropriate rulings and although they often went against Woodard's position, this does not make the trial court judge bias, infer bias, or violate the appearance of fairness doctrine.

1. Standard Of Review.

The appearance of fairness doctrine and whether a judge should be disqualified based upon if the judge's impartiality may reasonably be questioned is an objective test. *In re Swenson*, 158 Wn. App. 812, 818, 244 P.3d 959 (2010). An appearance of fairness claim will not succeed without evidence of actual or potential bias because the claim would be without merit. *Id.*

2. The Trial Court Did Not Violate The Appearance Of Fairness Doctrine During Woodard's Trial And Sentencing Proceedings.

A criminal defendant has a constitutional right to a fair trial by an impartial judge. U.S. Const. amends. VI, XIV; Const. art. I, § 22. The law requires more than just impartiality, the law requires a judge to also appear impartial. *State v. Gamble*, 168 Wn.2d 161, 187, 225 P.3d 973 (2010) (quotations and citations omitted). It is presumed that a judge acts without prejudice or bias. *Swenson*, 158 Wn. App. at 818. Judges are also required to disqualify himself or herself from a proceeding if the judge's impartiality may reasonably be questioned or they are biased against a party. CJC 2.11(A); *Swenson*, 158 Wn. App. at 818. Under the Code of Judicial Conduct:

> A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might

> reasonably be questioned including but not limited to the following circumstances:
>
> (1) The judge has a personal bias or prejudice concerning a party or a party's lawyers, or personal knowledge of facts that are in dispute in the proceeding.

CJC 2.11(A)(1).

"The appearance of fairness doctrine is 'directed at the evil of a biased or potentially interested judge or quasi-judicial decision maker.'" *Swenson*, 158 Wn. App. at 818, *citing State v. Post*, 118 Wn.2d 596, 618-19, 826 P.2d 172 (1992). Under the objective standard, "a judicial proceeding is valid only if a reasonably prudent, disinterested observer would conclude that the parties received a fair, impartial and neutral hearing." *Gamble*, 168 Wn.2d at 187 (internal quotations and citations omitted). Allegedly improper or biased comments are considered in context. *See, e.g.*, *Gamble,* 168 Wn.2d at 188; *In re Dependency of O.J.*, 88 Wn. App. 690, 697, 947 P.2d 252 (1997). A defendant who has reason to believe a judge is biased and impartial must affirmatively act if they wish to pursue a claim for violation of the appearance of fairness doctrine. *Swenson*, 158 Wn. App. at 818. A defendant cannot simply wait until he or she has an adverse ruling to move for disqualification of a judge if that defendant has reason to believe

the judge should be disqualified. *Id*. Nothing in the record indicated Woodard alleged any type of bias during the trial court proceedings or sought to have Judge Brosey removed from the case. *See* RP.

a. Judge Brosey did not violate the appearance of fairness doctrine or show actual bias when he denied defense counsel's various motions to dismiss the case or for a mistrial.

Woodard appears to be arguing because the trial court did not rule in his favor, for motions that sought extraordinary remedies and were not supported by the law, that the judge was somehow bias against him.

A trial court's decision to deny a mistrial is reviewed under an abuse of discretion standard. *State v. Rodriguez*, 146 Wn.2d 260, 269, 45 P.3d 541 (2002). This Court will find a trial court abused its discretion "only when no reasonable judge would have reached the same conclusion." *Rodriguez*, 146 Wn.2d at 269 (internal quotations and citation omitted). Similarly a trial court's decision to deny a motion to dismiss will be reviewed under a manifest abuse of discretion standard. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638, (2003) "The reviewing court will find an abuse of discretion when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons." *Rohrich*, 149 Wn.2d at 654.

A trial court's granting of a mistrial is an extraordinary remedy. *Rodriguez*, 146 Wn.2d at 270. A trial court "should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can ensure that the defendant will be tried fairly." *Id.* (internal quotations and citation omitted). A reviewing court will only overturn a trial court's denial of a motion for a mistrial "when there is a substantial likelihood that the error prompting the mistrial affected the jury's verdict." *Id.* at 269-70. When considering whether an irregularity affected the outcome of a trial, the reviewing court considers "(1) the seriousness of the irregularity, (2) whether it involved cumulative evidence, and (3) whether the trial court properly instructed the jury to disregard it." *State v. Rafay*, 168 Wn. App. 734, 811, 285 P.3d 83 (2012), *citing State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989).

The denial of the motion for a mistrial, for the alleged improper comment on the evidence, was a reasonable ruling by the judge and Woodard had not shown that such a ruling was an abuse of discretion. *Rodriguez*, 146 Wn.2d at 269; 1RP 128-30. As argued above, the instruction was not an improper judicial comment on the evidence. The comment and subsequent denial of the motion for mistrial exhibit no bias on the part of the trial judge.

Admissibility of evidence determinations by the trial court are reviewed under an abuse of discretion standard. *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967 (1999) (citations omitted). "A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable reasons or grounds." *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003), *citing State v. Stenson,* 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). A trial court's conclusions of law are reviewed de novo. *State v. Johnson,* 128 Wn.2d 431, 443, 909 P.2d 293 (1996).

If the trial court's evidentiary ruling is erroneous, the reviewing court must determine if the erroneous ruling was prejudicial. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). An error is prejudicial if "within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *Id.* (citations omitted). When evaluating if there was a substantial likelihood that the error affected the outcome of this case this Court considers three key inquiries. *Rafay*, 168 Wn. App. at 811. First, the seriousness level of the error, second, if the error involved cumulative evidence, and third, if "the trial court properly instructed the jury to disregard" the error. *Id.*

Judge Brosey's ruling regarding the motion for dismissal for Deputy Shannon allegedly violating the CrR 3.5 hearing ruling, and Mr. Neff and Mr. Barnes' violation of the pretrial rulings regarding the limitations of their testimony were proper and once again, Woodard has not met his burden to show the trial court abused its discretion. 3RP 70-76; 4RP 69-70, 82-83. The trial judge noted that Deputy Shannon's testimony was not necessarily in violation of the CrR 3.5 hearing because of the peculiar way the hearing was conducted. 3RP 70-72. Judge Brosey also commented that a dismissal was not a proper remedy to which trial counsel then asked to have the testimony excluded, the State asked to reopen the CrR 3.5 hearing and the limited statements, which were consistent with the taped statements of Woodard, were found to be admissible. 3RP 72-90. Woodard has not and cannot show an abuse of discretion by the trial judge.

The motion to dismiss for the violation of the pretrial order requiring parties not to mention other sexual encounters Woodard may have told Mr. Barnes or Mr. Ness about was properly denied. 4RP 69-70. The trial court properly found that the Mr. Barnes was simply answering Woodard's trial attorney's question on cross-examination because the question invited the response about the

other sexual encounters. 4RP 68-70. The judge was in the midst of ruling and Mr. Blair asked to have the question read back to which Judge Brosey told him, "You can be quiet." A judge has the right and the power to ensure orderly proceedings. RCW 2.28.010. Telling a participant to be quiet, while the judge is making his ruling, does not violate the appearance of fairness doctrine or infer bias. Further, in regards to the improper testimony, the trial court gave a curative instruction to disregard the previous question and answer. 4RP 76.

When asked what Woodard had told Mr. Ness about Christmas Eve 2008 Mr. Ness included in his response that Woodard said they were smoking some crack. 4RP 78. Mr. Blair asked for a dismissal due to the violation of pretrial motion not to mention drug use, or in the alternative, a mistrial. 4RP 82. Judge Brosey ruled the brief mention of drug use was not so egregious to warrant dismissal or a mistrial and offered to give a curative instruction. 4RP 83. The invitation for a curative instruction was declined by Mr. Blair. 4RP 86. Woodard has not shown that this ruling was an abuse of discretion.

After the State concluded its case, Mr. Blair renewed his request for a mistrial based upon the violations of the pretrial order

regarding the testimony of prior sexual acts and drug use. 5RP 29. The trial court again denied the motion. 5RP 29. There was nothing new argued to the court and the denial of the motion was proper and not an abuse of discretion. Mr. Blair renewed this motion after the jury verdict and at the end of the sentencing hearing, both were again properly denied. 5RP 127, 175.

Mr. Blair also made what is commonly referred to as a half time motion. 5RP 29. This motion is standard and is a motion asking for dismissal of the charges, arguing the State has not made a prima facie case for the charged counts. The facts of the case, that came out during the State's direct, as argued above are more than sufficient to find that there was evidence that established the facts necessary to prove the alleged crimes charged. *See* BLACK'S LAW DICTIONARY 579 (7th Ed 1999). The motion was properly denied.

Mr. Blair argued, at the close of all evidence, that there was insufficient evidence to support the kidnapping charge and asked that it be dismissed. 5RP 64. To prove Kidnapping in the First Degree the State had to prove, beyond a reasonable doubt, that Woodard intentionally abducted M.P. with the intent to facilitate the commission of Rape of a Child in the Second Degree or Child

Molestation in the Second Degree and the acts occurred in Washington State on or about December 24, 2008. RCW 9A.40.020(1)(b); WPIC 39.02; Appendix D; Pet. Ap. E, Instruction 6. To abduct a person one must restrain another by either secreting or holding the person in a place where that person is not likely to be found. RCW 9A.40.010(1); WPIC 39.30. A defendant challenging the sufficiency of evidence presented at a trial "admits the truth of the State's evidence" and all reasonable inferences therefrom are drawn in favor of the State. *State v. Goodman,* 150 Wn.2d 774, 781, 83 P.2d 410 (2004). As argued above, Woodard took M.P. to a dead end road, away from others, and raped her. This is sufficient to overcome a sufficiency of evidence motion and the trial court appropriately denied the motion. 5RP 65.

b. The trial court did not violate the appearance of fairness or exhibit bias by overruling Mr. Blair's objections during the State's closing arguments or by sustaining the State's objections during Mr. Blair's closing argument.

Woodard argues Judge Brosey's rulings on objections during closing argument are evidence of the judge's bias against Woodard. Petition at 32-35. Mr. Blair made three objections during the State's closing, alleging the State's misstatement of evidence, which were overruled. 5RP 85, 93, 98. "The trial court has broad

discretion to control the scope of closing argument." State v. Frazier, 55 Wn. App. 204, 212, 777 P.2d 27 (1989) (citations omitted)

During Mr. Blair's closing argument the State objected seven times, six were sustained. 5RP 103, 105-07. The State made similar objections to Mr. Blair's. *Id.* Mr. Blair attempted to argue evidence regarding the van that was not testified to. 5RP 107. Mr. Blair argued about the male sperm process, which was not testified to by any expert. *See* RP; 5RP 107. Mr. Blair also argued that M.P. did not tell the jurors when she was on the stand that she was wearing that blue hoody on December 24, 2008. 5RP 103. That is contrary to M.P.'s testimony that she was wearing a blue hoody at the time of the rape. 2.2RP 23. These objections were valid and properly sustained.

There were two more objections made by Mr. Blair that were overruled during the State's rebuttal closing argument. 5RP 117-18. In closing argument, the prosecutor is afforded wide latitude in drawing and expressing reasonable inferences from the evidence. *State v. Hoffman*, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991). The prosecutor has especially wide latitude when rebutting an issue the

defendant raised in closing argument *State v. Lewis*, 156 Wn. App. 230, 240, 233 P.3d 891 (2010).

The trial judge's ruling do not exhibit bias, actual or inferred, or violate the appearance of fairness doctrine. Similarly, Judge Brosey's denial of Mr. Blair's motion to dismiss based on the trial court's rulings to the objections during the closing argument was properly denied, because, as argued above, the trial court did not make erroneous rulings. 5RP 120-21. Woodard has not, and cannot meet his burden.

c. The preliminary instruction did not contain a comment on the evidence, therefore there is no evidence of bias.

As argued above in section B, the trial judge's statement during the preliminary instruction admonishing the jury not to view the area that gave rise to these allegations was not an improper comment on the evidence. Further, contrary to Woodard's argument, this statement, part of the standard preliminary instructions to the jury did not telegraph that Judge Brosey believed Woodard had raped M.P., thereby showing bias. Woodard is reaching for straws and cannot meet his burden to prove his allegation of bias.

d. Judge Brosey's comment during the sentencing hearing that he "was trying this case" was not in error and did not violate the appearance of fairness doctrine, demonstrate or infer bias.

Woodard argues that Judge Brosey's response to Woodard's question, "who is trying this case, you or the prosecutor?" during his sentencing hearing, when Judge Brosey replies, "I'm trying this case…" is evidence of Judge Brosey's bias against Woodard. Petition 25-26, 35; 5RP 160. Woodard fails to have candor to this Court about the actual exchange that was occurring in the courtroom during his sentencing proceedings. 5RP 160-61. Judge Brosey orders Woodard to be fingerprinted, to which there is an objection. 5RP 160.

> THE DEFENDNAT: I still object, your Honor.
>
> THE COURT: The objection is noted. Overruled.
>
> THE DEFENDANT: I'm not doing it.
>
> THE COURT: Yes, you are.
>
> THE DEFENDANT: Throw me in jail.
>
> THE COURT: I'm going to order that your prints are to be produced. If the officer has to physically print you, the officer will physically print you. I would suggest that you not make an effort to resist.
>
> THE DEFENDANT: Who is trying the case, you or the prosecutor?

> THE COURT: I'm trying the case and you're right on the edge of contempt. If I find you in contempt, it's dead time.
>
> THE DEFENDANT: So what?

5RP 160-61. This was an exchange between an extremely difficult defendant and the trial judge, who was asserting his control over the courtroom and the proceedings.

The judge also has statutory and inherent authority to impose sanctions for contempt of court. RCW 7.21.020; *State v. Berty*, 136 Wn. App. 74, 84, 147 P.3d 1004 (2006). The judge is able to punitively sanction a party, including a defendant in a criminal action, for acts of contempt of court. RCW 7.21.020; RCW 7.21.050; *Berty*, 136 Wn. App. at 84-85. The judge is allowed to hold Woodard in contempt of court and require him to serve time for failing to comply with court's order. RCW 7.21.020; RCW 7.21.050; *Berty*, 136 Wn. App. at 84-85. This is not bias.

3. A Disinterested Party Would Not Believe That Woodard Did Not Receive A Fair And Impartial Trial And Sentencing Hearing.

A disinterested party who witnessed the proceeding would not believe Woodard did not receive a fair and impartial hearing. There were numerous instances throughout the trial when the court

sustained Mr. Blair's objections, in particular when the State was attempting to admit the rape kit and panties. 3RP 177, 4RP 115-16.

Judge Brosey admonished and reminded the deputy prosecutor that he was not to use narrative testimony. 3RP 90. Also, in response to the deputy prosecutor asking the court why he was not being allowed to admit exhibits 28 and 29 Judge Brosey stated, "I'm not running an evidence course." 4RP 116-17.

Judge Brosey did not favor one party in this litigation. Woodard's frustration that the trial judge did not rule in his favor does not make that judge bias. The judge did not violate the appearance of fairness doctrine, or display bias. Woodard's petition should be dismissed.

D. THERE WAS NO CHAIN OF CUSTODY ISSUE IN THIS CASE. WOODARD'S ARGUMENT REGARDING A BREAK IN THE CHAIN OF CUSTODY GOES TO THE WEIGHT OF THE EVIDENCE, NOT ITS ADMISSIBILITY.

Woodard argues at length that the State did not sufficiently satisfy the requirements for the chain of custody for two exhibits, the rape kit and M.P.'s panties, therefore, the exhibits are inadmissible. Petition at 42-48. Woodard argues he was prejudiced by the lack of chain of custody because the jury would have viewed Ms. Shank's testimony differently if they had known the evidence was sent to a second lab for testing. Petition at 47-48. The State

sufficiently satisfied the chain of custody for the items it asked the trial court to admit and any issue regarding chain of custody goes to weight, not the admissibility of evidence. Woodard can show no error, let alone prejudice.

1. Standard of Review.

A determination regarding the admissibility of evidence by the trial court is reviewed under an abuse of discretion standard. *State v. Gresham*, 173 Wn.2d 405, 419, 269 P.3d 207 (2012); *Finch*, 137 Wn.2d at 810 (citations omitted). "A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable reasons or grounds." *C.J.*, 148 Wn.2d at 686, *citing Stenson,* 132 Wn.2d at 701.

2. The State Sufficiently Satisfied The Chain Of Custody Requirement And Issues In Regard To The Chain Of Custody Of The Items Analyzed For DNA Goes To The Weight Of The Evidence, Not Its Admissibility.

A party can sufficiently establish chain of custody to satisfy the foundational requirement to admit an exhibit even absent proof of an unbroken chain of custody. *State v. Picard*, 90 Wn. App. 890, 897, 921 P.2d 336 (1998). The object must be satisfactorily identified and there must be evidence that it is in substantially the same condition as it was when it was collected. *Picard*, 90 Wn. App. at 897. It is not required to have every single person who has

ever laid hands on the evidence be called to establish the chain of custody. *State v. Lui*, 179 Wn.2d 457, 481, 315 P.3d 493 (2014), *citing Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311, 129 S. Ct. 2527, 174 L. Ed. 2d 314, 327 (2009).

As the Supreme Court stated in *State v. Campbell*:

> The jury is free to disregard evidence upon its finding that the article was not properly identified or there has been a change in its character. However, minor discrepancies or uncertainty on the part of the witness will affect only the weight of evidence, not its admissibility.

State v. Campbell, 103 Wn.2d 1, 21, 691 P.2d 929 (1984).

Woodard complains the chain of custody was not established prior to admission of two of the State's exhibits, the rape kit and M.P.'s panties that were placed in with the rape kit. Petition at 40-48. The State elicited testimony from Lisa Engler, a nurse at Providence Centralia, that she collected the rape kit, which was listed as Exhibit 29. 3RP 163. Ms. Engler testified that her handwriting was all over the rape kit and she collected the underwear. 3RP 164. Exhibit 28, which was the ziplock bag containing the underwear, Ms. Engler recognized the evidence seal, her initials, and the time. 3RP 164; Pet. Ap. L. Ms. Engler explained how she watched M.P. remove her underwear and it was placed in the bag that Ms. Engler sealed up. 3RP 166. According to

Ms. Engler, exhibit 29 was the same except for the crime lab tape. 3RP 175.

Deputy Fulton testified that he remembered going to Providence and requesting from the nurse at the front desk the rape kit that was associated with a case. 4RP 152. Deputy Fulton said that exhibit 29 was what the nurse handed him. 4RP 152. According to Deputy Fulton he took the sealed kit to the Lewis County Sheriff's Office (LCSO) evidence facility and put it in the fridge, then taped the fridge with evidence tape and initialed the tape. 4RP 152-53. Deputy Fulton did acknowledge that the name on the kit looked familiar but he could not say that exhibit 29 was the same box as the one he picked up that night. 5RP 155.

Debra Hensley is a support technician assigned to the evidence division of the LCSO. 3RP 183. Ms. Hensley testified that when she came into work she checked the refrigerator at the evidence facility and the rape kit was inside. 3RP 184. Ms. Hensley explained when she retrieved the kit the refrigerator was sealed by the deputy who put the kit in it. 4RP 40. Ms. Hensley testified she removed the kit from the fridge and the kit was sealed with four seals with the initials LE on it. 3RP 185. The kit was sent to the Vancouver Crime Laboratory of Washington State Patrol. 3RP 186-

87. Ms. Hensley testified that she opened the box and removed exhibit 28, a pair of white underwear, from the kit. 3RP 188. Ms. Hensley also testified that the items were returned to the LCSO evidence division by FedEx. 4RP 38-39.

Teresa Shank, a forensic scientist at the Washington State Patrol Crime Laboratory in Vancouver testified as to how evidence is received by their crime lab. 4RP 93, 110-11. Ms. Shank explained she received exhibit 29 in sealed condition and after she finished her testing she sealed the item with blue tape and wrote her initials on it. 4RP 111-12. Ms. Shank testified that she always makes sure an item is sealed and exhibit 29 was sealed. 4RP 112. Ms. Shank also testified that a pair of underwear, exhibit 28, was located inside the box and she sealed the underwear back up in the box too. 4RP 113. Ms. Shank performed scientific testing on the items, including looking for semen in the underwear and DNA analysis. 4RP 123. After testing was completed the items were resealed and returned to LCSO. 4RP 142.

The testimony, outlined above, is sufficient to establish chain of custody. Ms. Engler need not have to be able to state that a pair of panties, void of any packaging, are the panties that she recovered from M.P. The panties, with the packaging, containing

Ms. Engler's writing all over it, her initials, the date, and the time, are sufficient to identify the underwear. Woodard spends considerable time arguing about how the evidence was sent to another outside laboratory for testing and the State did not bring in anyone from that laboratory to establish the continuous chain of custody. Petition 37-48. But the testimony regarding scientific testing that was admitted by the State was all about the testing at the Washington State Patrol Crime Laboratory, and the fact that the evidence was sent to an outside laboratory after it was returned by WSP to LCSO is inconsequential. Any break in the chain goes to weight, not admissibility, and there was likely a good, tactical reason, why Woodard's attorney did not want it discuss that the panties were sent to another laboratory.[8]

Chain of custody was sufficiently established. Further, the testimony from Ms. Shank and the WSP laboratory report regarding the panties and the rape kit yielded no conclusive DNA that could be tied to Woodard. See 4RP 93-149; Appendix C; Pet. Ap. H. Even if the State did not sufficiently establish the chain of custody

[8] Woodard also claims ineffective assistance of counsel in regards to the chain of custody issue and the alleged admittance of inadmissible evidence. The State will address this below in section G.

Woodard suffered no prejudice from this alleged error. This petition should be dismissed.

E. WOODARD WAS NOT DENIED HIS RIGHT TO COMPULSORY PROCESS AS GUARANTEED BY THE SIXTH AMENDMENT.

Woodard argues his constitutional right to compulsory process, to have a witness or witnesses testify on his behalf, was violated when his trial attorney failed to call a medical expert to testify on his behalf. Petition 50-68. Woodard was not denied his right to have witnesses appear and testify on his behalf. Woodard's complaint is not a compulsory process complaint, but an ineffective assistance of counsel argument, which will be dealt with below in section G.

First, Woodard complains his counsel did not engage in any pretrial investigations in regards to the medical reports. Petition at 58. From this conclusory statement Woodard argues that if there had been pretrial consultation with a doctor Mr. Blair would have ascertained the critical need to call a medical expert to testify on Woodard's behalf. Petition at 59. Woodard then argues this violates his Sixth Amendment right to compulsory process. Petition at 60.

A defendant does have a "right to compel the presence and present testimony of witnesses pursuant to the compulsory clause"

but this right is subject to limitation by reasonable procedural rules. *State v. O'Cain*, 169 Wn. App. 228, 244, 279 P.3d 926 (2012) (citations and internal quotations omitted). Woodard presents no evidence, except arguing lack of evidence in the record, that there was an attempt to secure subpoena for a medical expert. It is Woodard's burden to prove his allegations, and bare allegations and conclusory statements are not sufficient to sustain Woodard's burden of proof. There is no evidence of any violation of his compulsory process right. *Lewis,* 156 Wn. App. at 244. Woodard's claim fails and his petition should be dismissed.

F. WOODARD WAS AFFORDED AND TOOK ADVANTAGE OF HIS RIGHT TO CONFRONT AND CROSS-EXAMINE WITNESSESS CALLED AGAINST HIM.

Woodard argues his confrontation rights were violated when his trial attorney's attempt to impeach two of the State's witnesses at trial and when his attorney failed to ask certain questions of another of the State's witnesses. Petition at 50, 52-54, 68-71. This is not a violation of Woodard's confrontation rights as guaranteed by the United States Constitution. Woodard was afforded his right to confront and cross-examine witnesses brought to testify against him.

1. Standard of Review.

This court reviews alleged violations of the confrontation clause de novo. *State v. Irby*, 170 Wn.2d 874, 880, 246 P.3d 796 (2011) (citations omitted).

2. Woodard Was Able To Confront The Witnesses The State Had Testify Against Him.

A person accused of a crime has the right to confront and cross-examine his or her accuser. U.S. Const. amend VI; U.S. Const. amend XIV; Const. art. I § 22. There is no absolute right to cross-examine an adverse witness. *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). It is within the sound discretion of the trial court to make determinations that limit the scope of cross-examination, particularly if the sought after evidence is speculative, vague or argumentative. *Id.* at 620-621. Cross-examination is also limited to relevant evidence. *Id.* at 621, *citing* ER 401; ER 403; *State v. Hudlow* 99 Wn.2d 1, 15, 659 P.2d 514 (1983).

Woodard's entire argument is that his attorney failed to properly impeach some of the State's witnesses and this was a violation of his confrontation rights. There was no violation of Woodard's confrontation clause rights. Woodard's attorney was afforded the opportunity and did in fact cross-examine the State's witnesses. See 2.1RP, 2.2RP, 3RP, 4RP, 5RP. Woodard's

argument is actually an ineffective assistance of counsel argument, and the State will address that issue below in section G.

G. WOODARD RECEIVED EFFECTIVE ASSISTANCE FROM HIS ATTORNEY THROUGHOUT THE PENDENCY OF HIS CASE UP TO AND INCLUDING SENTENCING.

Despite Woodard's assertions to the contrary, his attorney provided competent and effective legal counsel throughout the course of his representation.

Woodard argues his trial attorney, Mr. Blair, was ineffective for essentially six different reasons, (1) allowing portions of Ms. Wahl's testimony to be admitted even though it was inadmissible legal conclusions and improper opinion testimony, (2) failing to depose Ms. Wahl prior to her testifying for the State, (3) failing to move the trial court for a dismissal after the impermissible testimony from Ms. Wahl was admitted, (4) failing to seek suppression or exclusion of the rape kit and panties, (5) failing to conduct a proper defense investigation of the case and call an expert to testify on Woodard's behalf, and (6) failing to properly impeach three of the State's witnesses. Petition at 21, 48, 50, 58-59, 51-63, 65, 68-70.

Woodard's attorney was not ineffective in any of the areas of his representation. Woodard does not back up his argument with

anything other than conclusory statements and allegations. Woodard presents no competent evidence to this Court in support of his ineffective assistance of counsel claims. Woodard has not met his burden and his claim of ineffective assistance of counsel fails.

1. Standard Of Review.

A claim of ineffective assistance of counsel brought on a direct appeal confines the reviewing court to the record on appeal and extrinsic evidence outside the trial record will not be considered. *State v. McFarland,* 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (citations omitted).

2. It Is Woodard's Burden To Show That His Attorney Was Ineffective.

To prevail on an ineffective assistance of counsel claim Woodard must show that (1) the attorney's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The presumption is that the attorney's conduct was not deficient. *Reichenbach*, 153 Wn.2d at 130, *citing State v. McFarland*, 127 Wn.2d at 335. Deficient performance exists only if counsel's actions were "outside the wide range of professionally

competent assistance." *Strickland*, 466 U.S. at 690. The court must evaluate whether given all the facts and circumstances the assistance given was reasonable. *Id.* at 688. There is a sufficient basis to rebut the presumption that an attorney's conduct is not deficient "where there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, 153 Wn.2d at 130.

If counsel's performance is found to be deficient, then the only remaining question for the reviewing court is whether the defendant was prejudiced. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). Prejudice "requires 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *State v. Horton*, 116 Wn. App. at 921-22, *citing Strickland*, 466 U.S. at 694.

3. Mr. Blair's Handling Of Ms. Wahl And Her Testimony Was Not Ineffective.

Woodard argues that Mr. Blair was ineffective in his handling of Ms. Wahl, whether by allowing her to testify to what he claims is inadmissible testimony and impermissible legal conclusions, failing to depose Ms. Wahl, or failing to ask for Woodard's case to be dismissed after the alleged impermissible testimony was admitted. Petition at 21. As argued above in section A, the only issue with Ms. Wahl's testimony was her testifying that blunt penetrating

trauma was rape, which was an impermissible legal conclusion. 5RP 14 The State would agree that failing to object to this testimony could be considered deficient. 5RP 14. Yet, it is conceivable that Mr. Blair made a tactical decision to let that testimony go because Ms. Wahl was going to have to testify that M.P.'s findings were within the range of normal and she could not say M.P. suffered a blunt penetrating trauma. See Pet. Ap. C, page 4. Mr. Blair necessarily read the report from the Sexual Assault Clinic which stated in its findings, "The physical exam findings were normal, with normal variances. The injuries described in the emergency room report dated 12/25/08 have healed…It is important to understand that normal or nonspecific genital or anal exam cannot prove that past sexual abuse did or did not occur." Pet. Ap. C, page 4 (dated 1/2/09).

In a trial setting, if an attorney's conduct can be characterized as legitimate tactics or trial strategy the attorney's performance is not deficient. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). If an attorney's actions are trial tactics or the theory of the case the reviewing court will not find ineffective assistance of counsel. *Grier*, 171 Wn.2d at 33. A "defendant can rebut the presumption of reasonableness by demonstrating that

there is no conceivable legitimate tactic explaining counsel's performance." *Grier*, 171 Wn.2d at 33 (internal quotations and citations omitted). Woodard cannot meet this burden, therefore, any argument Woodard makes alleging Mr. Blair was ineffective in his handling of Ms. Wahl's testimony fails. There was no need to object to testimony that was permissible, as argued in section A, and there is a legitimate tactical reason for Mr. Blair to not object to the legal conclusion that the legal term for blunt penetrating trauma is rape. Ms. Wahl saw no evidence of blunt penetrating trauma and testified to this during cross-examination. 5RP 22.

Because there was no impermissible testimony and the decision to not object to the rape comment appears to be a tactical decision, there is no reason for Mr. Blair to move for a dismissal after Ms. Wahl testified. Defense counsel is not required to make motions that have no legal basis. *State v. McWilliams*, 177 Wn. App. 139, 156, 311 P.3d 584 (2013).

Lastly, Mr. Blair does not have the right to depose a witness except under certain circumstances in a criminal case. CrR 4.6.

> The court may order a deposition when (1) the court finds that a prospective witness may be unable to attend or prevented from attending a trial or hearing, (2) a witness refuses to discuss the case with either counsel and the witness' testimony is material and

> necessary, or (3) there is good cause shown to take the deposition.

CrR 4.6(a). Woodard presents no evidence to this Court that any of the three conditions set forth in CrR 4.6(a) were met. *See* Petition. Mr. Blair had a copy of the sexual assault exam. Appendix E.[9] Mr. Blair also received a copy of Ms. Wahl's curriculum vitae prior to trial. Appendix F. Mr. Blair was well aware of the content of Ms. Wahl's potential testimony as well as her credentials. Mr. Blair was not ineffective for failing to depose Ms. Wahl.

4. The Rape Kit And Panties Were Properly Admitted Once The State Established The Chain of Custody, Therefore, Mr. Blair Was Not Ineffective For Failing To Ask The Court To Exclude Or Suppress The Evidence.

Woodard argues Mr. Blair was ineffective for failing to move to suppress or exclude the rape kit and panties as the evidence was inadmissible because there was a lack of foundation due to a broken chain of custody. Petition 48-50. "An attorney's performance is not deficient for declining to raise frivolous or groundless matters." *McWilliams*, 177 Wn. App. at 156. McWilliams argued his attorney was ineffective for failing to move for dismissal of an

[9] The State only included the cover letter that accompanied the report submitted to the Prosecutor's Office from Providence Sexual Assault Center. The report can be found in Pet. Ap. C. The date the letter and report were given to Mr. Blair are noted on the bottom by "cc: Blair 1-30-09".

assault charge despite there being insufficient evidence to support the charge. *McWilliams*, 177 Wn. App. at 156. This Court held that it had already found there was sufficient evidence to support the convictions and McWilliams' attorney was not deficient for failing to bring such a groundless or frivolous motion. *Id.*

The State argued above that chain of custody was properly established and the rape kit, exhibit 28, and the panties, exhibit 29, were admissible and properly admitted by the trial court. See section D. Mr. Blair, just as the attorney in *McWilliams*, was not deficient for failing to raise a groundless and frivolous motion such as the one Woodard argues should have been raised. Woodard's ineffective assistance of counsel claim on this ground fails.

5. Woodard Has Presented No Competent Evidence That His Trial Counsel Failed To Conduct A Proper Investigation And That Failure To Call An Expert Was Not A Tactical Decision.

Woodard asserts that Mr. Blair failed to investigate the medical aspect of the case in any way and Mr. Blair's failure to do so and failure to call a medical expert to testify on Woodard's behalf was ineffective assistance of counsel. Petition 56. Woodard argues the failure to call an expert witness violated his right to compulsory process. Petition 61-63. Woodard offers no evidence to support his allegations and it is his burden to show prejudicial error and present

this Court with competent evidence supporting his claims. *See* Petition 56-65.

A criminal defendant is entitled to counsel that provides assistance in his or her defense of the charge pending against the defendant. *United States v. Cronic*, 466 U.S. 648, 653-54, 104 S. Ct. 2039, 80 L. Ed.2d 657 (1984). This right entails an attorney who will act as an advocate and protect the adversarial process. *Cronic*, 466 U.S. at 656.

When a defendant raises a failure to investigate claim the defendant must show "a reasonable likelihood that the investigation would have produced **useful** information not already known to the defendant's trial counsel." *In re Davis*, 152 Wn.2d 647, 739, 101 P.3d 1 (2004) (emphasis added). A defendant who makes a showing that his or her trial counsel failed to investigate still must show that the deficient performance prejudiced him or her. *In re Davis*, 152 Wn.2d at 739. "In evaluating prejudice, ineffective assistance claims based on a duty to investigate must be considered in light of the strength of the government's case." *Id.* (citation and internal quotation marks omitted). Woodard had not met his burden to show that his attorney failed to investigate, let alone that any investigation would have led to useful evidence.

An attorney's decision whether to call a witness to testify on behalf of his or her client is "a matter of legitimate trial tactics, which will not support a claim of ineffective assistance of counsel." *State v. Manschke,* 160 Wn. App. 479, 492, 251 P.3d 884 (2011), *citing State v. Byrd,* 30 Wn. App. 794, 799, 638 P.2d 601 (1981) (internal quotations omitted). If a petitioner can show that his or her trial counsel failed to prepare for trial or adequately investigate then the petitioner has overcome the presumption of effectiveness. *Id.* (citations omitted).

It is Woodard's burden to show prejudicial error. *In re Gronquist*, 138 Wn.2d at 396. Conclusory statements and allegations, without reference to the record cannot sustain this burden of proof. *Brune*, 45 Wn. App. at 363. Woodard must support his petition with the facts upon which the claim of unlawful restraint rests, and Woodard may not rely solely on conclusory allegations. *In re Cook*, 114 Wn.2d at 813-14; *Monschke*, supra, 160 Wn. App. at 488; RAP 16.7(a)(2)(i). Because Woodard's allegations are outside the existing record (with the exception of the fact that no medical expert was called to testify on Woodard's behalf), Woodard must demonstrate that he has competent, admissible evidence to

establish the facts that entitle him to relief. *Monschke* at 488; *In re Rice*, 118 Wn.2d at 886.

Woodard fails to meet his burden. Woodard could have obtained a declaration from Mr. Blair regarding these allegations but has failed to do so. Instead of obtaining a declaration from his trial attorney Woodard makes conclusory statements about Mr. Blair's lack of medical background and training and that the decision to not have an expert witness testify was not tactical because Mr. Blair never explored the option. Petition at 58-59, 65. This does not satisfy Woodard's burden and his claim of ineffective assistance of counsel for failing to investigate or have an expert witness testify fails.

6. Woodard's Counsel Was Not Ineffective For Failing To Properly Impeach The State's Witnesses.

Woodard argues Mr. Blair was ineffective for failing to properly impeach three of the State's witnesses, Mr. Hazelrigg, Deputy Shannon, and Mr. Barnes. Petition at 68-70. Woodard points to his trial counsel's frustration during the trial when he was attempting to impeach Mr. Hazelrigg as evidence that his attorney was ineffective. Petition at 69, citing 2.1RP 94-99. Woodard argues his attorney's incompetence was further evidenced by the trial

court's *sua sponte* objection to Mr. Blair's impeachment process, difficulty impeaching Deputy Shannon, and outright failure to impeach Mr. Barnes using Mr. Barnes own declaration. Petition at 69-70, citing 3RP 135, 142-46; 5RP 46-60.

Mr. Blair was able to impeach and/or elicit the testimony out of Mr. Hazelrigg and Deputy Shannon. See 2.1RP 94-104; 3RP 135-148. Mr. Blair was able to elicit from Mr. Hazelrigg that he told Mr. Blair that he and his brother did not bring drugs back to Woodard's house because the people would not sell drugs to Mr. Hazelrigg's brother. 2.1RP 102-03. Mr. Hazelrigg also testified he did not go to purchase drugs, that he went for a chainsaw, which he was unsuccessful in securing. 2.1RP 103-04.

In regards to Deputy Shannon, after many sustained objections and proceedings outside the presence of the jury, Mr. Blair was able to elicit from Deputy Shannon the testimony he ultimately wanted. 3RP 135-48. It is clear that Deputy Shannon and Mr. Blair had a miscommunication about the question. 3RP 147. Once Deputy Shannon understood the question she answered that Woodard said he did not have a problem with talking to her. 3RP 148. While Mr. Blair may have had some difficulty with the witnesses, he was able to get the testimony he wanted in his cross-

examination and therefore, his performance was not deficient, let alone ineffective in regards to Mr. Hazelrigg and Deputy Shannon.

In regards to Mr. Barnes, the State concedes it is odd that Mr. Blair would not question Mr. Barnes about the declaration Mr. Barnes wrote stating he had nothing useful or relevant to testify about and wished to be removed from the witness list. See 4RP 66-77; Pet. Ap. N. On its face this would appear to be deficient performance because at a minimum the question of why did you at one time say you had nothing relevant to say but now are testifying that Woodard told you he had oral sex with M.P. would be relevant and potentially helpful. It is unknown if Mr. Blair spoke to Mr. Barnes and knew the answer to this question was not something Mr. Blair wanted to elicit. Regardless, failing to ask a question may have been deficient but it was not prejudicial. The jury clearly knew Mr. Barnes was a convicted felon doing prison time. 4RP 62, 66-67. Mr. Barnes testified that he received no benefit for his testimony. 4RP 66. Woodard must show he was prejudiced by his attorney's deficient performance. Beyond the jury already knowing that for all intents and purposes Mr. Barnes was a jail house snitch who was now doing prison time, the testimony of Mr. Barnes was similar to the testimony told by Mr. Neff, the other person who had been

housed in the Lewis County jail with Woodard. 4RP 63-64, 78-79. Also, as argued above there was overwhelming evidence to convict Woodard of the charged crimes. Woodard cannot show he suffered any prejudice from Mr. Blair's failure to impeach Mr. Barnes regarding his declaration and Woodard's claim of ineffective assistance of counsel fails and this petition should be dismissed.

H. WOODARD RECEIVED EFFECTIVE ASSISTANCE FROM HIS APPELLATE COUNSEL.

Woodard argues his appellate counsel was ineffective for failing to assign error to the trial court judge's denials of trial counsel's motions for a mistrial based upon the improper testimony of Mr. Barnes and Mr. Neff. Petition at 71-74; Appendix G, pages 1-2. Woodard argues he was prejudiced by this because this Court refused to address the merits of his argument that the testimony of Mr. Barnes and Mr. Neff violated his right to a fair trial. Petition at 71-74; See Appendix B, page 14.[10] Woodard contends he would have prevailed on his direct appeal had appellate counsel properly assigned error. Petition at 71-74.

In a claim of ineffective assistance of appellate counsel the heightened standard of review normally required for personal

[10] The page number referred to is the page number listed in the actual unpublished decision.

restraint petitions does not apply. *In re D'Allesandro*, 178 Wn. App. 457, 470, 314 P.3d 744 (2013). "[T]o prevail on a claim of ineffective assistance of appellate counsel [a] [p]etitioner must demonstrate the merit of any legal issue appellate counsel raised inadequately or failed to raise and also show he was prejudiced." *In re D'Allessandro*, 178 Wn. App. at 470 (internal quotations and citations omitted).

To establish appellate counsel's deficient performance Woodard must show his appellate counsel should have known she needed to assign error to the trial court's denials of the motions for mistrial but failed to properly do so. *Id.* To establish prejudice, Woodard must show that had his appellate counsel assigned error to the denials of the motions for mistrial based upon Mr. Neff and Mr. Barnes' testimony about the prior sexual encounters and drug use he would have prevailed on the issue and his convictions would have been reversed and the case remanded back to the trial court. *Id.* Woodard cannot meet this burden.

The State will concede that this Court declined to reach the merits of whether Mr. Barnes and Mr. Neff's testimony regarding the prior sexual encounters and drug use violated Woodard's right to a fair trial. *See* Appendix B, page 14. The State also concedes

that appellate counsel's failure to assign error to the trial court's mistrial rulings was deficient. *In re D'Allesandro*, 178 Wn. App. at 470; Appendix G, pages 1-2. The deficient performance did not prejudice Woodard because the trial court did not abuse its discretion when it denied the motion for a mistrial. *See* section C(2)(a) above. Woodard would not have prevailed on the fair trial issue, any error in the trial court's ruling would have been deemed harmless because of the overwhelming evidence, and this Court would not have reversed the convictions and remanded the case back to the trial court. *See* arguments above. Woodard has not met his burden to show prejudice and his claim of ineffective assistance of appellate counsel therefore fails. This Court should dismiss this petition.

I. THERE IS NO CUMALITVE ERROR WHICH WOULD WARRANT DISMISSAL OF WOODARD'S CASE.

The doctrine of cumulative error applies in situations where there are a number of trial errors, which standing alone may not be sufficient justification for a reversal of the case, but when those errors are combined the defendant has been denied a fair trial. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000) (citations omitted). As argued above, with the exception of the impermissible testimony regarding a legal conclusion and the failure to impeach

Mr. Barnes, Woodard has not established any of the other errors he alleged in his petition actually occurred. The doctrine of cumulative error does not apply in Woodard's case.

//

//

//

//

//

//

//

//

//

//

//

//

//

//

//

//

//

V. CONCLUSION

Woodard cannot meet his burden of proof for any of the alleged errors he contends require reversal of his convictions. Ms. Wahl's testimony was proper, but for the legal conclusion, and any error was harmless because of the overwhelming untainted evidence against Woodard. Woodard received a fair trial by an impartial jury. There was no inferred or actual bias on the part of the trial judge. Woodard exercised his right to confront and examine witnesses and fails to meet his burden to show that he was denied his right to compulsory process. Woodard received effective assistance from both his trial and appellate counsel. Finally there is no cumulative error that compels this Court to reverse and remand the case for a new trial. This Court should dismiss Woodard's personal restraint petition.

RESPECTFULLY submitted this 17th day of June, 2014.

JONATHAN MEYER
Lewis County Prosecuting Attorney

by:_____
SARA I. BEIGH, WSBA 35564
Attorney for the Respondent.

Appendix A

Judgment and Sentence

Superior Court of Washington
County of Lewis

State of Washington, Plaintiff,

vs.

GEORGE PATRICK WOODARD,
Defendant.

SID: WA12417891
DOB: 7/28/1965

No. 08-1-00876-7

Felony Judgment and Sentence -- Persistent Offender
(FJS)

[X] Clerk's Action Required, para 2.1, 4.1, 4.3, 5.2 5.3, 5.5 and 5.7

I. Hearing

1.1 The court conducted a sentencing hearing this date; the defendant, the defendant's lawyer, and the undersigned (deputy) prosecuting attorney were present.

II. Findings

2.1 Current Offenses: The defendant is guilty of the following offenses, based upon [X] jury-verdict (date) December 1, 2009, as charged in the Amended Information:

Count	*Crime*	*RCW (w/subsection)*	*Class*	*Date of Crime*
I	Kidnapping in the First Degree with Sexual Motivation	9A.40.020(1)(b)	FA	On or about 12/24/2008
II	Rape of a Child in the Second Degree	9A.44.076	FA	On or about 12/24/2008
III	Child Molestation in the Second Degree	9A.44.086	FB	On or about 12/24/2008

Class: FA (Felony-A), FB (Felony-B), FC (Felony-C)
(If the crime is a drug offense, include the type of drug in the second column.)
[ ] Additional current offenses are attached in Appendix 2.1a.

[ ] Count _____ is a most serious offense and the defendant has been convicted on at least two separate occasions of most serious offense felonies, at least one of which occurred before the commission of the other most serious offense for which the defendant was previously convicted.

[X] Counts I and II are crimes listed in RCW 9.94A.030(33)(b)(i) (e.g., rape in the first degree, rape of a child in the first degree (when the offender was 16 years of age or older when the offender committed the offense), child molestation in the first degree, rape in the second degree, rape of a child in the second degree (when the offender was 18 years of age or older when the offender committed the offense), or indecent liberties by forcible compulsion; or any of the following offenses with a finding of sexual motivation: murder in the first degree,

10.9.153.4

murder in the second degree, homicide by abuse, kidnapping in the first degree, kidnapping in the second degree, assault in the first degree, assault in the second degree, assault of a child in the first degree, assault of a child in the second degree, or burglary in the first degree; or an attempt to commit any crime listed in RCW 9.94A.030(33)(b)(i)), and that the defendant has been convicted on at least one separate occasion, whether in this state or elsewhere, of a crime listed in RCW 9.94A.030(33)(b)(i) or any federal or out-of-state offense or offense under prior Washington law that is comparable to the offenses listed in RCW 9.94A.030(33)(b)(i).

The jury returned a special verdict or the court made a special finding with regard to the following:

[ ] The defendant engaged, agreed, offered, attempted, solicited another, or conspired to engage a victim of child rape or child molestation in sexual conduct in return for a fee in the commission of the offense in Count _____. RCW 9.94A.839.

[ ] The offense was predatory as to Count _____. RCW 9.94A.836.

[ ] The victim was under 15 years of age at the time of the offense in Count _____ RCW 9.94A.837.

[ ] The victim was developmentally disabled, mentally disordered, or a frail elder or vulnerable adult at the time of the offense in Count _____. RCW 9.94A.838 and RCW 9A.44.010.

[X] The defendant acted with **sexual motivation** in committing the offense in Count I. RCW 9.94A.835.

[ ] This case involves **kidnapping** in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW, where the victim is a minor and the offender is not the minor's parent. RCW 9A.44.130.

[ ] The defendant used a **firearm** in the commission of the offense in Count _____. RCW 9.94A.602, 9.94A.533.

[ ] The defendant used a **deadly weapon other than a firearm** in committing the offense in Count _____ _____. RCW 9.94A.602 and RCW 9.94A.533.

[ ] Count _____ is a **criminal street gang**-related felony offense in which the defendant compensated, threatened, or solicited a **minor** in order to involve that minor in the commission of the offense. RCW 9.94A.833.

[ ] Count _____ is the crime of **unlawful possession of a firearm** and the defendant was a **criminal street gang** member or associate when the defendant committed the crime. RCW 9.94A.702, 9.94A.____.

[ ] Count _____ involves **attempting to elude** a police vehicle and during the commission of the crime the defendant endangered one or more persons other than the defendant or the pursuing law enforcement officer. RCW 9.94A.834.

[ ] The defendant committed **[ ] vehicular homicide [ ] vehicular assault** proximately caused by driving a vehicle while under the influence of intoxicating liquor or drug or by operating a vehicle in a reckless manner. The offense is, therefore, deemed a violent offense. RCW 9.94A.030.[ ] The crime(s) charged in Count _____ involve(s) **domestic violence.** RCW 10.99.020.

[X] Counts I, II, and III encompass the same criminal conduct and count as one crime in determining the offender score (RCW 9.94A.589).

[ ] **Other current convictions listed under different cause numbers used in calculating the offender score are** (list offense and cause number):

	Crime	Cause Number	Court (county & state)
1.			
2.			

(If the crime is a drug offense, include the type of drug in the second column.)

[ ] Additional current convictions listed under different cause numbers used in calculating the offender score are attached in Appendix 2.1b.

2.2 Criminal History (RCW 9.94A.525):

	Crime	Date of Crime	Date of Sentence	Sentencing Court (county & state)	A or J Adult, Juv.	Type of Crime
1	Child Molestation in the First Degree	On or about and between 11/5/88 and 6/14/89	11/29/1989	Thurston County Superior Court (Thurston County, WA)	A	Violent Sex Offense
2						
3						
4						
5						

[ ] Additional criminal history is attached in Appendix 2.2.

[ ] The defendant committed a current offense while on community placement/community custody (adds one point to score). RCW 9.94A.525.

[X] The prior offenses listed as number(s) I above, or in appendix 2.2, require that the defendant be sentenced as a **Persistent Offender** (RCW 9.94A.570).

[ ] The prior convictions listed as number(s) _____ above, or in appendix 2.2, are one offense for purposes of determining the offender score (RCW 9.94A.525).

[ ] The prior convictions listed as number(s) _____ above, or in appendix 2.2, are not counted as points but as enhancements pursuant to RCW 46.61.520.

2.3 Sentencing Data:

Count No.	Offender Score	Seriousness Level	Standard Range (not including enhancements)	Plus Enhancements*	Total Standard Range (including enhancements)	Maximum Term
I	3	X	Min. of 67-89 mo. and max. of life	SM	Min. of 67-89 mo. and max. of life followed by 24 months	Life
II	3	XI	Min. of 102-136 mo. and max. of life	n/a	Min. of 102-136 mo. and max. of life	Life
III	3	VII	Min. of 31-41 mo. and max. of 120 mo.	n/a	Min. of 31-41 mo. and max. of 120 mo.	10 years

* (F) Firearm, (D) Other deadly weapons, (VH) Veh. Hom, see RCW 46.61.520, (SM) Sexual motivation, RCW 9.94A.533(8), (SCF) Sexual conduct with a child for a fee, RCW 9.94A.533(9), (CSG) criminal street gang involving minor, (AE) endangerment while attempting to elude.

[ ] Additional current offense sentencing data is attached in Appendix 2.3.

For violent offenses, most serious offenses, or armed offenders, recommended **sentencing agreements or plea agreements** are [ ] attached [ ] as follows: _____.

2.5 Ability to Pay Legal Financial Obligations. The court has considered the total amount owing, the defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that:

[X] The defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

[ ] The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):

_____.

[X] The defendant has the present means to pay costs of incarceration. RCW 9.94A.760.

III. Judgment

3.1 The defendant is ***guilty*** of the Counts and Charges listed in Paragraph 2.1 and Appendix 2.1.

3.2 [ ] The court ***dismisses*** Counts _____ in the charging document.

IV. Sentence and Order

It is ordered:

4.1 Confinement. RCW 9.94A.570. The court sentences the defendant to the following term of total confinement in the custody of the Department of Corrections:

Life without the possibility of early release on Count I,

Life without the possibility of early release on Count II,

Count III minimum term: 41 months maximum term: Statutory Maximum followed by 24 months pursuant to the sexual motivation enhancement.

Actual number of months of total confinement ordered is: life without the possibility of early release.

All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of firearm or other deadly weapon as set forth above at Section 2.3, and except for the following counts which shall be served consecutively:

_____.

The sentence herein shall run consecutively with the sentence in cause number(s) _____

_____

but concurrently to any other felony cause not referred to in this judgment. RCW 9.94A.589.

Confinement shall commence immediately unless otherwise set forth here: _____.

Court Ordered Treatment: If the defendant is currently undergoing court ordered mental health or chemical dependency treatment, the defendant must notify DOC and must release treatment information to DOC. RCW 9.94A.562.

4.2 Other: Defendant shall receive credit for 395 days served in the Lewis ~~Defendant shall have credit~~ County Jail

_____

_____

_____.

4.3 Legal Financial Obligations: The defendant shall pay to the clerk of this court:

JASS CODE			
PCV	$ 500.00	Victim assessment	RCW 7.68.035
PDV	$	Domestic Violence assessment	RCW 10.99.080
CRC	$	Court costs, including RCW 9.94A.760, 9.94A.505, 10.01.160, 10.46.190	
		Criminal filing fee $ 200.00 FRC	
		Witness costs $ WFR	
		Sheriff service fees $ 1,176.60 SFR/SFS/SFW/WRF	
		Jury demand fee $ JFR	
		Extradition costs $ EXT	
		Other $	
PUB	$ TBD	Fees for court appointed attorney	RCW 9.94A.760
WFR	$	Court appointed defense expert and other defense costs	RCW 9.94A.760
FCM/MTH	$	Fine RCW 9A.20.021; [ ] VUCSA chapter 69.50 RCW, [ ] VUCSA additional fine deferred due to indigency RCW 69.50.430	
CDF/LDI/FCD NTF/SAD/SDI	$	Drug enforcement fund of	RCW 9.94A.760
CLF	$	Crime lab fee [ ] suspended due to indigency	RCW 43.43.690
	$ 100.00	DNA collection fee	RCW 43.43.7541
FPV	$	Specialized forest products	RCW 76.48.140
	$ 1,000.00	Lewis County Jail Fee Reimbursement	RCW 9.94A.760(2)
	$	Other fines or costs for:	
RTN/RJN	$	Emergency response costs (Vehicular Assault, Vehicular Homicide. Felony DUI, only, $1000 maximum)	RCW 38.52.430
		Agency:	
	$ TBD	Restitution to:	
RTN/RJN	$ TBD	Restitution to:	
	$ TBD	Restitution to: (Name and Address--address may be withheld and provided confidentially to Clerk of the Court's office.)	
	$	***Total***	RCW 9.94A.760

[X] The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:

[X] shall be set by the prosecutor.

[ ] is scheduled for _____ (date).

[ ] The defendant waives any right to be present at any restitution hearing (sign initials): _____.

[ ] ***Restitution*** Schedule attached.

[ ] Restitution ordered above shall be paid jointly and severally with:

	Name of other defendant	***Cause Number***	(Victim's name)	(Amount-$)
RJN				

[ ] The Department of Corrections (DOC) or clerk of the court shall immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602, RCW 9.94A.760(8).

[X] The court orders the defendant to pay costs of incarceration at the rate of $ 25.00 per day (actual costs not to exceed $100 per day). (*JLR*) RCW 9.94A.760.

The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160.

4.4 DNA Testing. The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

[X] ***HIV Testing.*** The defendant shall submit to HIV testing. RCW 70.24.340.

4.5 No Contact:

[X] The defendant shall not have contact with M.M.P. (DOB 11/26/1996) including, but not limited to, personal, verbal, telephonic, written or contact through a third party for life (which does not exceed the maximum statutory sentence).

[X] The defendant is excluded or prohibited from coming within 500 feet (distance) of M.M.P.'s [X] home/ residence [X] work place [X] school [ ] (other location(s)) _____, or [ ] other location: _____, for life (which does not exceed the maximum statutory sentence).

[X] A separate Domestic Violence No-Contact Order, Antiharassment No-Contact Order, or Sexual Assault Protection Order is filed concurrent with this Judgment and Sentence.

4.6 Other: The Defendant shall have no criminal law violations. The Defendant shall have law-abiding behavior. The Defendant shall not have any contact, directly or indirectly, with minor children, WITH THE EXCEPTION OF HIS OWN CHILDREN, ALICIA WOODARD & NAVY WOODARD.

V. Notices and Signatures

5.1 Collateral Attack on Judgment. If you wish to petition or move for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, you must do so within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.

5.2 Length of Supervision. If you committed your offense prior to July 1, 2000, you shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. If you committed your offense on or after July 1, 2000, the court shall retain jurisdiction over you, for the purpose of your compliance with payment of the legal financial obligations, until you have completely satisfied your obligation, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505(5). The clerk of the court has authority to collect unpaid legal financial obligations at any time while you remain under the jurisdiction of the court for purposes of your legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).

5.3 Notice of Income-Withholding Action. If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections (DOC) or the clerk of the court

may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606.

5.4 Reserved.

5.5 Firearms. **You may not own, use or possess any firearm unless your right to do so is restored by a superior court in Washington State, and by a federal court if required. You must immediately surrender any concealed pistol license.** (The clerk of the court shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047.

Delete or cross off if not applicable:

5.6 [X] Sex and Kidnapping Offender Registration. RCW 9A.44.130, 10.01.200.

1. General Applicability and Requirements: Because this crime involves a sex offense or kidnapping offense involving a minor as defined in RCW 9A.44.130, you are required to register with the sheriff of the county of the state of Washington where you reside. If you are not a resident of Washington but you are a student in Washington or you are employed in Washington or you carry on a vocation in Washington, you must register with the sheriff of the county of your school, place of employment, or vocation. You must register immediately upon being sentenced unless you are in custody, in which case you must register within 24 hours of your release.

2. Offenders Who Leave the State and Return: If you leave the state following your sentencing or release from custody but later move back to Washington, you must register within three business days after moving to this state or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections. If you leave this state following your sentencing or release from custody but later while not a resident of Washington you become employed in Washington, carry on a vocation in Washington, or attend school in Washington, you must register within three business days after starting school in this state or becoming employed or carrying out a vocation in this state, or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections.

3. Change of Residence Within State and Leaving the State: If you change your residence within a county, you must send signed written notice of your change of residence to the sheriff within 72 hours of moving. If you change your residence to a new county within this state, you must send signed written notice of your change of residence to the sheriff of your new county of residence at least 14 days before moving and register with that sheriff within 24 hours of moving. You must also give signed written notice of your change of address to the sheriff of the county where last registered within 10 days of moving. If you move out of Washington State, you must send written notice within 10 days of moving to the county sheriff with whom you last registered in Washington State.

4. Additional Requirements Upon Moving to Another State: If you move to another state, or if you work, carry on a vocation, or attend school in another state you must register a new address, fingerprints, and photograph with the new state within 10 days after establishing residence, or after beginning to work, carry on a vocation, or attend school in the new state. You must also send written notice within 10 days of moving to the new state or to a foreign country to the county sheriff with whom you last registered in Washington State.

5. Notification Requirement When Enrolling in or Employed by a Public or Private Institution of Higher Education or Common School (K-12): If you are a resident of Washington and you are admitted to a public or private institution of higher education, you are required to notify the sheriff of the county of your residence of your intent to attend the institution within 10 days of enrolling or by the first business day after arriving at the institution, whichever is earlier. If you become employed at a public or private institution of higher education, you are required to notify the sheriff for the county of your residence of your employment by the institution within 10 days of accepting employment or by the first business day after beginning to work at the institution, whichever is earlier. If your enrollment or employment at a public or private institution of higher education is terminated, you are required to notify the sheriff for the county of your residence of your termination of enrollment or employment within 10 days of such termination. If you attend, or plan to attend, a public or private school regulated under Title 28A RCW or chapter 72.40 RCW, you are

required to notify the sheriff of the county of your residence of your intent to attend the school. You must notify the sheriff within 10 days of enrolling or 10 days prior to arriving at the school to attend classes, whichever is earlier. The sheriff shall promptly notify the principal of the school.

6. Registration by a Person Who Does Not Have a Fixed Residence: Even if you do not have a fixed residence, you are required to register. Registration must occur within 24 hours of release in the county where you are being supervised if you do not have a residence at the time of your release from custody. Within 48 hours excluding, weekends and holidays, after losing your fixed residence, you must send signed written notice to the sheriff of the county where you last registered. If you enter a different county and stay there for more than 24 hours, you will be required to register in the new county. You must also report weekly in person to the sheriff of the county where you are registered. The weekly report shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. You may be required to provide a list the locations where you have stayed during the last seven days. The lack of a fixed residence is a factor that may be considered in determining an offender's risk level and shall make the offender subject to disclosure of information to the public at large pursuant to RCW 4.24.550.

7. Reporting Requirements for Persons Who Are Risk Level II or III: If you have a fixed residence and you are designated as a risk level II or III, you must report, in person, every 90 days to the sheriff of the county where you are registered. Reporting shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. If you comply with the 90-day reporting requirement with no violations for at least five years in the community, you may petition the superior court to be relieved of the duty to report every 90 days.

8. Application for a Name Change: If you apply for a name change, you must submit a copy of the application to the county sheriff of the county of your residence and to the state patrol not fewer than five days before the entry of an order granting the name change. If you receive an order changing your name, you must submit a copy of the order to the county sheriff of the county of your residence and to the state patrol within five days of the entry of the order. RCW 9A.44.130(7).

5.7 Motor Vehicle: If the court found that you used a motor vehicle in the commission of the offense, then the Department of Licensing will revoke your driver's license. The clerk of the court is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke your driver's license. RCW 46.20.285.

5.8 Other: Any bail or bond previously posted is hereby exonerated..

Done in Open Court and in the presence of the defendant this date: 1/25/2010.

Judge/Richard Brosey

Richard L. Brosey
Judge

Deputy Prosecuting Attorney	Attorney for Defendant	Defendant
WSBA No. 35387	WSBA No. 27697	
Colin P. Hayes	Don Blair	George Patrick Woodard

Voting Rights Statement: I acknowledge that I have lost my right to vote because of this felony conviction. If I am registered to vote, my voter registration will be cancelled.

My right to vote is provisionally restored as long as I am not under the authority of DOC (not serving a sentence of confinement in the custody of DOC and not subject to community custody as defined in RCW 9.94A.030). I must re-register before voting. The provisional right to vote may be revoked if I fail to comply with all the terms of my legal financial obligations or an agreement for the payment of legal financial obligations.

My right to vote may be permanently restored by one of the following for each felony conviction: a) a certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) a court order issued by the sentencing court restoring the right, RCW 9.92.066; c) a final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) a certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 29A.84.660. Registering to vote before the right is restored is a class C felony, RCW 29A.84.140.

Defendant's signature: X _____

I am a certified interpreter of, or the court has found me otherwise qualified to interpret, the _____ _____ language, which the defendant understands. I translated this Judgment and Sentence for the defendant into that language.

Interpreter signature/Print name: _____

VI. Identification of the Defendant

SID No. WA12417891 (If no SID complete a separate Applicant card (form FD-258) for State Patrol)

Date of Birth 7/28/1965

FBI No. 215708CA4

Local ID No. _____

PCN No. _____

Other JUVIS#: 034982

HEIGHT: 5'7". WEIGHT: 125. EYES: BRO. HAIR: BRO.

Alias name, DOB: _____

Race:			**Ethnicity**:	**Sex**:
[ ] Asian/Pacific Islander	[ ] Black/African-American	[X] Caucasian	[ ] Hispanic	[X] Male
[ ] Native American	[ ] Other: _____		[X] Non-Hispanic	[ ] Female

Fingerprints: I attest that I saw the defendant who appeared in court affix his or her fingerprints and signature on this document.

Clerk of the Court, Deputy Clerk, S. Tylu Dated: 1/25/10

The defendant's signature: X

Left four fingers taken simultaneously	Left Thumb	Right Thumb	Right four fingers taken simultaneously

Appendix B

Unpublished Opinion, COA No. 40293-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

GEORGE P. WOODARD,
Appellant.

No. 40293-9-II

MANDATE

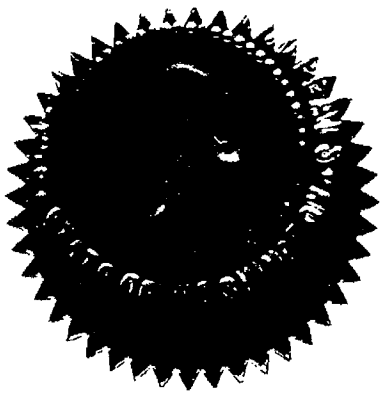
Lewis County Cause No.
08-1-00876-7

Court Action Required

The State of Washington to: The Superior Court of the State of Washington
in and for Lewis County

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division II, filed on September 13, 2011 became the decision terminating review of this court of the above entitled case on October 10, 2012. Accordingly, this cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Court Action Required: The sentencing court or criminal presiding judge is to place this matter on the next available motion calendar for action consistent with the opinion.



IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Tacoma, this 6th day of December, 2012.

Clerk of the Court of Appeals,
State of Washington, Div. II

cc:

Hon. Richard Lynn Brosey
Presiding Judge Hon. Nelson E. Hunt
Sara I Beigh
WSP Identification & Criminal History Section

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. GEORGE P. WOODARD, Appellant.	No. 40293-9-II UNPUBLISHED OPINION

ARMSTRONG, P.J. — George Patrick Woodard appeals his convictions for first degree kidnapping with sexual motivation, second degree child rape, and second degree child molestation. He argues that (1) his first degree kidnapping conviction merged with his child rape and child molestation conviction; (2) the jury instructions on second degree child molestation violated his constitutional right to a unanimous jury verdict and constitutional protection against double jeopardy; (3) the trial court improperly instructed the jury that its yes or no verdict on the special finding of sexual motivation had to be unanimous; (4) evidentiary errors violated his right to a fair trial; (5) the trial court improperly communicated with the jury during deliberations; (6) the sentencing court violated his constitutional right to equal protection of the laws by determining the existence of his prior convictions; and (7) the trial court erred by failing to enter

written findings of fact and conclusions of law following a CrR 3.5 hearing. We reverse Woodard's second degree child molestation conviction and affirm his remaining convictions.

FACTS

I. KIDNAPPING AND SEXUAL ASSAULT

In 2008, 12-year-old M.P. spent Christmas Eve with friends and family members at Woodard's home. M.P. wanted to go to the store to buy a snack, and Woodard agreed to drive her there.

According to M.P., Woodard drove directly to the store and waited in the parking lot while she purchased a snack. He then took a different route home, drove down a back road, and stopped the van. He ordered M.P. to get into the backseat and pull down her pants. He then licked her vagina, inserted his finger into her vagina, put his mouth on her breast over the outside of her sweatshirt, and inserted his penis into her vagina. He stopped after about 10 to 20 minutes and drove home.

The next day, M.P. told a friend what had happened. The State charged Woodard with first degree kidnapping, second degree child rape, and second degree child molestation.

II. CRR 3.5 HEARING

Before trial, the court held a CrR 3.5 hearing to determine the admissibility of Woodard's statements to a deputy during interviews on December 25 and 26, 2008. The undisputed evidence showed that the deputy read Woodard his *Miranda* rights[1] before both interviews and

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Woodard agreed to answer questions on both occasions. But Woodard argued that the court should suppress his statements from the second interview because, according to Woodard, he had told a booking officer before that interview that he wanted an attorney. In a lengthy oral ruling, the trial court "conditionally" ruled that all of Woodard's statements were admissible. I Report of Proceedings (RP) at 197-99. The court stated that it would do some independent research on the issue of whether Woodard had successfully invoked his right to counsel: "I'll do some research on my own on the second issue and see what I can find as can counsel, so we can revisit this if we need to." I RP at 197-99. At trial, neither party contested the admissibility of Woodard's statements from the December 26 interview or presented additional authority to the court on that issue.

III. MISTRIAL MOTIONS

During a pretrial hearing on motions in limine, defense counsel expressed concern that two of the State's witnesses might testify that Woodard had told them he had sex with M.P. on six prior occasions. The State said that it did not intend to elicit testimony about uncharged prior sexual incidents, and the trial court directed the State to instruct its witnesses not to mention Woodard's alleged admissions. The parties also agreed not to elicit testimony regarding any of the witnesses' drug and alcohol use.

At trial, during defense counsel's cross-examination of James Barnes, defense counsel asked, "[Woodard] told you he didn't have sexual intercourse with [M.P.]?" IV RP at 68. Barnes replied, "On Christmas day. On Christmas eve he did not. He had six times of

intercourse before that he bragged about." IV RP at 68. Defense counsel immediately moved for a mistrial, outside the jury's presence. The trial court denied the motion, ruling that defense counsel's question had invited the response. The court then recalled the jury and instructed them to disregard the previous question and answer.

Later, during direct examination of Jonathan Neff, the State asked, "Did [Woodard] ever indicate anything that he had done on Christmas eve of 2008?" IV RP at 78. Neff replied, "Well, he indicated he was at his house with some friends and his wife and they were smoking crack and he was asked—I can't say if he asked or if the victim had asked to go to the store to get some candy. . . ." IV RP at 78. Neff then related what Woodard had told him about what happened after he took M.P. to the store.

At the conclusion of Neff's testimony, defense counsel again moved for a mistrial. The trial court denied the motion, ruling that the State did not purposely elicit testimony regarding Woodard's drug use and that, within the context of Neff's testimony as a whole, the violation was not egregious enough to warrant a mistrial. The trial court offered to instruct the jury to disregard the question and answer, but defense counsel declined the offer.

IV. Jury Instructions and Deliberations

Defense counsel did not object to any of the State's proposed instructions. During deliberations, the jury submitted a question to the trial court expressing confusion over the definition of "sexual contact:" "Regarding # 13 of instruction packet. Sexual contact means any touching of the sexual or other intimate parts. Does this include bare and/or covered breast?" Clerk's Papers (CP) at 52. The trial court responded, "Answer: Reread all your instructions."

CP at 52. After further deliberations, the jury found Woodard guilty on all counts and found by a special verdict that he committed first degree kidnapping with sexual motivation.

V. SENTENCING

At sentencing, the State alleged that Woodard had a prior conviction from 1989 for first degree child molestation and presented a certified copy of the judgment and sentence. Woodard contested the sufficiency of the State's evidence. Following testimony from several witnesses regarding fingerprint records, booking records, sex offender registration records, and testimony from the arresting officer for the prior crime, the trial court found that the State had proven Woodard's prior conviction by a preponderance of the evidence.

Based on this prior conviction and Woodard's current convictions for first degree kidnapping and second degree child rape, the sentencing court found that Woodard was a persistent offender and sentenced him to life without the possibility of parole. For the second degree child molestation conviction, the court sentenced Woodard to 41 months' confinement, to be served concurrently with his life sentence.

ANALYSIS

I. MERGER OF FIRST DEGREE KIDNAPPING WITH CHILD RAPE AND CHILD MOLESTATION

Woodard first contends that his multiple convictions for kidnapping, child rape, and child molestation violate the double jeopardy clauses of our state and federal constitutions. Woodard reasons that because his kidnapping conviction was elevated to the first degree based on his intent to facilitate child rape and child molestation, the underlying offenses should merge with

the greater crime of first degree kidnapping. We disagree.

A. Standard of Review

We review double jeopardy claims de novo. *State v. Jackman*, 156 Wn.2d 736, 746, 132 P.3d 136 (2006). Our state and federal constitutions protect a defendant against multiple punishments for the same offense. U.S. CONST. amend. V; WASH. CONST. art. I, § 9; *State v. Calle*, 125 Wn.2d 769, 772, 888 P.2d 155 (1995). Under the merger doctrine, when a particular degree of a crime requires proof of another crime, "we presume the legislature intended to punish both offenses through a greater sentence for the greater crime." *State v. Freeman*, 153 Wn.2d 765, 772-73, 108 P.3d 753 (2005) (citing *State v. Vladovic*, 99 Wn.2d 413, 419, 662 P.2d 853 (1983)); *State v. Johnson*, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979), *overruled on other grounds by State v. Sweet*, 138 Wn.2d 466, 980 P.2d 1223 (1999). A separate conviction for the included crime will not stand unless it involved an injury to the victim that is separate and distinct from the greater crime. *Johnson*, 92 Wn.2d at 680.

B. Merger Does Not Apply

The State charged Woodard with first degree kidnapping under RCW 9A.40.020(1)(b), which provides, "A person is guilty of kidnapping in the first degree if he intentionally abducts another person with intent . . . [t]o facilitate commission of any felony or flight thereafter. . . ." The trial court instructed the jury that to convict Woodard of first degree kidnapping, it must find "[t]hat the defendant abducted [M.P.] with intent to facilitate the commission of rape of a child in the second degree and/or child molestation in the second degree . . . ." CP at 35. Thus, Woodard's kidnapping conviction was elevated to the first degree based on his *intent* to commit

rape and child molestation, not proof that he actually committed those crimes.[2]

In *In re Personal Restraint of Fletcher*, 113 Wn.2d 42, 776 P.2d 114 (1989), our Supreme Court held that the defendant's convictions for first degree kidnapping and first degree robbery did not merge because the kidnapping statute merely requires intent to commit another crime:

> However, the [first degree kidnapping] statute only requires proof of *intent* to commit various acts, some of which are defined as crimes elsewhere in the criminal code. It does not require that the acts actually be committed. RCW 9A.40.020. . . . Thus, the Legislature has not indicated that a defendant must also commit another crime in order to be guilty of first degree kidnapping, and therefore the merger doctrine does not apply. As a result, Fletcher may be punished separately for the kidnapping and robbery convictions.

Fletcher, 113 Wn.2d at 52-53; *see also State v. Louis*, 155 Wn.2d 563, 571, 120 P.3d 936 (2005). In *State v. Vaughn*, 83 Wn. App. 669, 682, 924 P.2d 27 (1996), Division One of this court relied on *Fletcher* to hold that first degree kidnapping does not merge with first degree child rape. The *Vaughn* court reasoned, "Merger does not apply when the definition of a crime requires proof only that the defendant *intended* to commit another crime. . . . Because Vaughn need only have had the intent to rape C, and not have actually completed the rape, his crimes do not merge." *Vaughn*, 83 Wn. App. at 682.

Despite this clear authority to the contrary, Woodard relies on *Johnson*, 92 Wn.2d at 681, to argue that his convictions merge. But *Johnson* is distinguishable. In *Johnson*, the *completed*

---

[2] A person commits second degree rape of a child when "the person has sexual intercourse with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim." RCW 9A.44.076(1). A person commits second degree child molestation when "the person has . . . sexual contact with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim." RCW 9A.44.086(1).

crimes of kidnapping and assault elevated the defendant's rape conviction to the first degree. *Johnson*, 92 Wn.2d at 674, 681. Here, Woodard's *intent* to commit an additional crime elevated his kidnapping conviction to the first degree. Accordingly, merger does not apply. *Fletcher*, 113 Wn.2d at 52-53; *Vaughn*, 83 Wn. App. at 682.

II. CHILD MOLESTATION INSTRUCTION ON UNANIMITY AND SEPARATE AND DISTINCT ACTS

Woodard next contends that the trial court erred by failing to instruct the jury that to convict him of second degree child molestation, it must unanimously agree on a single act that is separate and distinct from the act forming the basis for second degree child rape. He argues that this error violated both his constitutional right to a unanimous jury verdict and his constitutional protection against double jeopardy. We agree.

A. Standard of Review

Although Woodard did not raise this objection at trial, failure to give a unanimity instruction affects a defendant's constitutional right to a jury trial and may be raised for the first time on appeal. *State v. Hanson*, 59 Wn. App. 651, 659, 800 P.2d 1124 (1990) (citing *State v. Camarillo*, 115 Wn.2d 60, 64, 794 P.2d 850 (1990); *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988)). A double jeopardy challenge also affects a constitutional right and may be raised for the first time on appeal. *Jackman*, 156 Wn.2d at 746. We review alleged constitutional errors de novo. *State v. Bradshaw*, 152 Wn.2d 528, 531, 98 P.3d 1190 (2004).

B. Unanimity Instruction

A criminal defendant has a constitutional right to a unanimous jury verdict. WASH.

CONST. art. I, § 22; *State v. Stephens*, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). When the State presents evidence of multiple acts that could constitute the crime charged, "the State must tell the jury which act to rely on in its deliberations or the [trial] court must instruct the jury to agree on a specific criminal act." *Kitchen*, 110 Wn.2d at 409. The prosecution's failure to elect the act coupled with the court's failure to instruct the jury on unanimity, is constitutional error. *Kitchen*, 110 Wn.2d at 411. "The error stems from the possibility that some jurors may have relied on one act or incident and some another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction." *Kitchen*, 110 Wn.2d at 411.

Here, the trial court instructed the jury that to convict Woodard of second degree child molestation, it had to find that he had sexual contact with M.P. on December 24, 2008.[3] The jury was instructed that "sexual contact" means "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party." CP at 42. Although the trial court gave a unanimity instruction for the child rape charge,[4] it did not give a similar

---

[3] Instruction 12 provides:

> To convict the defendant of the crime of child molestation in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about December 24, 2008, the defendant had sexual contact with [M.P.];
>
> (2) That [M.P.] was at least twelve years old but less than fourteen years old at the time of the sexual contact and was not married to the defendant;
>
> (3) That [M.P.] was at least thirty-six months younger than the defendant; and
>
> (4) That this act occurred in the State of Washington. . . .

CP at 41.

[4] Instruction 14 provides:

> The State alleges that the defendant committed acts of rape of a child in the second degree on multiple occasions. To convict the defendant of rape of a child in the second degree, one particular act of rape of a child in the second degree must be proved beyond a reasonable doubt, and you must unanimously agree as to

instruction for the child molestation charge.

The State presented evidence of four acts that could constitute sexual contact: touching M.P.'s breast, touching the outside of her vagina, inserting his finger into her vagina, and inserting his penis into her vagina. The State argues that it elected Woodard's action of putting his mouth on M.P.'s vagina as the basis for the molestation. In closing arguments, the State argued that Woodard had sexual contact with M.P. when he put his mouth on her vagina and that this satisfied the elements of second degree child molestation. But during deliberations, the jury submitted a question to the trial court expressing confusion over whether sexual contact included touching a bare or covered breast. The jury's question shows that it considered at least one other basis for the child molestation charge and did not necessarily rely on the act that the State argued in closing. Given these circumstances, the failure to clearly elect a specific act or instruct the jury to agree on a specific act for the child molestation charge violated Woodard's right to a unanimous jury verdict. *Kitchen*, 110 Wn.2d at 411.

The State argues that a unanimity instruction is not required when the evidence shows that the defendant was engaged in a continuing course of conduct. "Under appropriate facts, a continuing course of conduct may form the basis of *one charge* in an information." *State v. Petrich*, 101 Wn.2d 566, 571, 683 P.2d 173 (1984)), *overruled on other grounds by Kitchen*, 110 Wn.2d at 405-06 (emphasis added). Here, the State based two charges on the same series of acts: child rape and child molestation. The jury was instructed to unanimously agree on a

---

> which act has been proved. You need not unanimously agree that the defendant committed all of the acts of rape of a child in the second degree.

CP at 43.

specific act for the rape charge. If the jury was then allowed to base the child molestation charge on the entire course of conduct, including the act already supporting the rape conviction, Woodard would be punished twice for the same act in violation of double jeopardy principles.

The State next argues that the failure to instruct the jury on unanimity was harmless error. The error is harmless if no rational trier of fact could have a reasonable doubt as to whether each of the multiple acts presented to the jury established the crime beyond a reasonable doubt. *Kitchen*, 110 Wn.2d at 411. Here, the jury's question shows that it was not certain whether one of the acts presented established the crime beyond a reasonable doubt.

C. Separate and Distinct Acts Instruction

Additionally, a criminal defendant is constitutionally protected against multiple punishments for the same offense. U.S. CONST. amend. V; WASH. CONST. art. I, § 9; *State v. Calle*, 125 Wn.2d 769, 772, 888 P.2d 155 (1995). When the State presents evidence of multiple acts that could constitute more than one of the crimes charged, the trial court should instruct the jury that each count must be based on a separate and distinct act. *State v. Mutch*, 171 Wn.2d 646, ¶ 28-31, 254 P.3d 803 (2011); *State v. Noltie*, 116 Wn.2d 831, 846, 809 P.2d 190 (1991); *State v. Carter*, 156 Wn. App. 561, 565-67, 234 P.3d 275 (2010); *State v. Berg*, 147 Wn. App. 923, 931-35, 198 P.3d 529 (2008). If the instructions do not inform the jury that each count must be based on a separate and distinct act, then we must determine whether the evidence, arguments, and instructions made the separate acts requirement "'manifestly apparent to the jury.'" *Mutch*, 171 Wn.2d at ¶ 31 (quoting *Berg*, 147 Wn. App. at 931). If the separate acts requirement was not manifestly apparent to the jury, then we must vacate the convictions that potentially violate double jeopardy. *Mutch*, 171 Wn.2d at ¶ 31.

Here, the jury was not instructed that it had to base convictions for child rape and child molestation on separate acts. The State presented evidence of multiple acts that could constitute both child molestation and child rape. Although the State argued in closing that one particular act supported the child molestation charge, the jury's question shows that it considered at least one other basis and did not necessarily rely on the act that the State argued. Because the instructions, evidence, and arguments did not make the separate acts requirement manifestly apparent to the jury, Woodard's second degree child molestation conviction also violated his constitutional protection against double jeopardy. *Mutch*, 171 Wn.2d at ¶ 27-31. Accordingly, we reverse Woodard's conviction and concurrent sentence for second degree child molestation.

III. UNANIMITY INSTRUCTION: SPECIAL VERDICT

Woodard next contends that the trial court improperly instructed the jury that its "yes" or "no" finding for the special verdict on sexual motivation had to be unanimous. The challenged instruction provided:

> If you find the defendant guilty of this crime of kidnapping in the first degree, you will then use the special verdict form and fill in the blank with the answer "yes" or "no" according to the decision you reach. *Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form.* In order to answer the special verdict form "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. *If you unanimously have a reasonable doubt as to this question, you must answer "no."*

CP at 49-50 (emphasis added and omitted). A jury is not required to unanimously agree that the State failed to prove a special finding. *State v. Bashaw*, 169 Wn.2d 133, 145-47, 234 P.3d 195 (2010); *State v. Goldberg*, 149 Wn.2d 888, 892-94, 72 P.3d 1083 (2003). Accordingly, this instruction incorrectly stated the law.

But Woodard did not object to this instruction at trial, and there is a split between Divisions One and Three of this court regarding whether this instructional error affects a constitutional right and may, therefore, be raised for the first time on appeal. *See State v. Nunez*, 160 Wn. App. 150, 158-63, 248 P.3d 103 (2011) (holding the instructional error is not constitutional), *review granted*, 2011 WL 3523949 (2011); *State v. Ryan*, 160 Wn. App. 944, 948-49, 252 P.3d 895 (2011) (holding the instructional error is constitutional), *review granted*, 2011 WL 3523883 (2011).

In *Bashaw*, our Supreme Court implied that the error was not constitutional, but then applied a constitutional harmless error analysis. *Bashaw*, 169 Wn.2d at 146 n.7, 147. The error is therefore harmless if we conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error. *Bashaw*, 169 Wn.2d at 147. Assuming, without deciding, that a defendant may raise this issue for the first time on appeal, we are satisfied that the error is harmless beyond a reasonable doubt.

The special verdict required the jury to determine whether Woodard committed first degree kidnapping with sexual motivation, meaning "one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification." CP at 51, 56. Because the jury had already unanimously determined that Woodard committed first degree kidnapping with intent to facilitate the commission of second degree child rape and/or second degree child molestation, we are satisfied beyond a reasonable doubt that, absent the instructional error, the jury would have still found that Woodard committed first degree kidnapping with sexual motivation. *Bashaw*, 169 Wn.2d at 147. We affirm the jury's special

finding.

IV. EVIDENTIARY ERRORS

Woodard next contends that the testimony from Barnes and Neff regarding his admissions of prior sexual acts with M.P. and drug use on the day of the charged crimes, which violated the trial court's orders in limine, violated his right to a fair trial. But Woodard does not assign error to the trial court's denial of his mistrial motions based on these evidentiary errors or argue that the trial court abused its discretion by refusing to grant a mistrial. A trial court will grant a mistrial "'when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly.'" *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989) (quoting *State v. Mak*, 105 Wn.2d 692, 701, 718 P.2d 407 (1986)). Because the trial court has already determined that the challenged evidentiary errors did not prejudice Woodard or prevent him from having a fair trial, and Woodard does not assign error to those rulings in his appeal, we decline to address this argument.

V. TRIAL COURT'S EX PARTE COMMUNICATION WITH JURY

Woodard next contends that the trial court erred by communicating with the deliberating jury without notifying him or his counsel. The State relies on *State v. Langdon*, 42 Wn. App. 715, 713 P.2d 120 (1986), to argue that the error, if any, was harmless. We agree that the error was harmless.

"Any communication between the court and the jury in the absence of the defendant is error and must be proven by the State to be harmless beyond a reasonable doubt." *Langdon*, 42 Wn. App. at 717; *see also State v. Caliguri*, 99 Wn.2d 501, 508-09, 664 P.2d 466 (1983). Here,

nothing in the record shows that either Woodard or his defense counsel was informed of the jury's question or was present when the trial court responded.

In *Langdon*, 42 Wn. App. at 717, a deliberating jury sent a note to the trial court asking for clarification on one of the instructions: "Does 'committing' mean aid in escaping?" After unsuccessfully trying to locate counsel, the trial court replied, "You are bound by those instructions already given to you." *Langdon*, 42 Wn. App. at 717. Division One of this court held that the trial court's error of communicating with a deliberating jury outside the presence of the defendant or his counsel was harmless "because the court's instruction was neutral, simply referring the jury back to the previous instructions." *Langdon*, 42 Wn.2d at 717-18.

Woodard argues that the trial court's response was not harmless in this case because it referred the jury back to the incomplete jury instructions regarding the second degree child molestation charge. Because we reverse Woodard's conviction for second degree child molestation, any potential prejudice from referring the jury back to those instructions has already been remedied. Accordingly, we hold that the trial court's ex parte communication with the jury was harmless beyond a reasonable doubt. *See Langdon*, 42 Wn. App. at 718.

VI. EQUAL PROTECTION

Woodard next contends that allowing the trial court to find that he is a persistent offender based on his 1989 conviction for first degree child molestation violated his constitutional right to equal protection, because other criminal defendants have the right to have a jury find their prior convictions beyond a reasonable doubt when the conviction is an element of the crime charged. Specifically, Woodard takes issue with our Supreme Court's reasoning in *State v. Roswell*, 165 Wn.2d 186, 192-94, 196 P.3d 705 (2008).

In *Roswell*, the defendant was charged with communication with a minor for immoral purposes, a crime that is elevated from a gross misdemeanor to a felony if the defendant has a prior conviction for the same crime or a felony sex offense. *Roswell*, 165 Wn.2d at 190; RCW 9.68A.090. The defendant requested that the court bifurcate the trial by having a jury decide the elements of the crime as a misdemeanor and the court separately determine the prior conviction that elevated the misdemeanor to a felony. *Roswell*, 165 Wn.2d at 190. Our Supreme Court affirmed the trial court's ruling rejecting the defendant's request, holding that because the defendant could not be convicted of felony communication with a minor for immoral purposes without proof of the prior conviction, the prior conviction was an essential element of the crime charged and had to be proven to a jury beyond a reasonable doubt. *Roswell*, 165 Wn.2d at 194.

The *Roswell* court reasoned that "[d]espite the similarities between an aggravating factor and a prior conviction element . . . . [t]he prior conviction is not used to merely increase the sentence beyond the standard range but actually alters the crime that may be charged." *Roswell*, 165 Wn.2d at 192. Although the court recognized that under *Apprendi v. New Jersey*, 530 U.S. 466, 468-69, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), prior convictions may be found by a trial court when they function as a sentencing aggravator, the court stated that the *Apprendi* exception does not apply where the prior conviction is an element of the crime rather than an aggravating factor. *Roswell*, 165 Wn.2d at 193 n.5.

Woodard argues that the *Roswell* court's distinction between a prior conviction as a sentencing aggravator and a prior conviction as an element of a crime is arbitrary because the prior conviction in his case operates in the same fashion as it does in *Roswell*—it merely alters the maximum penalty that the offender is subject to. Divisions One and Three of this court have

already considered and rejected the argument that *Roswell*'s distinction violates equal protection. *See State v. Langstead*, 155 Wn. App. 448, 454-57, 228 P.3d 799 (2010); *State v. Williams*, 156 Wn. App. 482, 496-99, 234 P.3d 1174 (2010). We follow *Langstead* and *Williams*. Woodard must pursue his challenge to *Roswell*'s reasoning in the Supreme Court.

VII. FINDINGS OF FACT

Finally, Woodard contends that because the trial court failed to enter written findings of fact and conclusions of law following the CrR 3.5 hearing, we must reverse his convictions because the lack of findings and conclusions prejudiced his right to appeal. We disagree.

CrR 3.5(c) requires the trial court to enter written findings of fact and conclusions of law following a CrR 3.5 hearing: "After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefor." A trial court's failure to enter written findings and conclusions is an error, but the error is harmless if the court's oral findings are sufficient to permit appellate review. *See State v. Cunningham*, 116 Wn. App. 219, 226, 65 P.3d 325 (2003) (citing *State v. Smith*, 67 Wn. App. 81, 87, 834 P.2d 26 (1992)).

Here, the trial court's lengthy oral ruling is sufficient to permit appellate review. But Woodard does not raise any issues for us to review: he does not challenge the trial court's oral findings of fact or conclusions of law, and he does not argue that inadmissible statements were improperly admitted at trial. He simply argues that the trial court erred by failing to enter written findings and conclusions. Accordingly, although the trial court should have entered written findings of fact and conclusions of law, the error was harmless.

We reverse Woodard's conviction for second degree child molestation and remand for the trial court to vacate the child molestation sentence. We affirm the remaining convictions and sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, P.J.

We concur:

Van Deren, J.

Johanson, J.

Appendix C

Washington State Patrol Crime Laboratory Report

Laboratory No. 509-000053, Dated 4/29/09

CHRISTINE O. GREGOIRE
Governor

JOHN R. BATISTE
Chief

STATE OF WASHINGTON
WASHINGTON STATE PATROL

1401 Kauffman Avenue • Vancouver WA 98660 • (360) 993-3800, FAX (360) 993-3899 • www.wsp.wa.gov

CRIME LABORATORY REPORT

Agency:	Lewis County Sheriff's Office	**Laboratory Number:**	509-000053
Agency Rep:	Detective Jamey McGinty	**Agency Case Number:**	08C15792
Subject:	Victim – [redacted]	**Request Number:**	0003
Subject:	Suspect – Woodard, George P.		

Evidence Examined

Item 23: One sealed envelope containing oral reference swabs reportedly collected from George P. Woodard.

The purpose of this examination was to determine the existence of any forensically significant associations between the DNA typing profile obtained from the above submitted item and the DNA typing profile of Individual A obtained from the blue sweatshirt (item 4), and the black underwear (item 5) [See Washington State Patrol Vancouver Crime Laboratory report 509-000053 (R. 0001, 0002) dated April 23, 2009 by this analyst].

Procedures and Results

A portion of the oral reference swabs from George P. Woodard (item 23) was removed and extracted for its DNA content using standard extraction procedures.

The DNA extract was next quantified for human DNA and then amplified using established polymerase chain reaction (PCR) procedures with the Applied Biosystems AmpF/STR® Profiler Plus® and COfiler® amplification kits. The amplified DNA was then analyzed on an AB 3130 Genetic Analyzer. AmpF/STR® Profiler Plus® is a short tandem repeat (STR) multiplex which targets the following genetic regions: D3S1358, vWA, FGA, D8S1179, D21S11, D18S51, D5S818, D13S317, D7S820, and amelogenin (a sex determination site). AmpF/STR® COfiler® is an STR multiplex which targets the following genetic regions: D3S1358, D16S539, TH01, TPOX, CSF1PO, D7S820, and amelogenin. A threshold of 150 relative fluorescence units (RFU) and above is used for allele designation.

Conclusions

1) The DNA typing profile obtained from the blue sweatshirt (item 4, sample 4.D) is of mixed origin consistent with having originated from at least two individuals. The profile of the major component **matches** the profile of George P. Woodard (item 23). The estimated probability of selecting an unrelated individual at random from the U.S. population with a matching profile is 1 in 15 quadrillion.

2) The DNA typing profile obtained from the blue sweatshirt (item 4, sample 4.A) is a mixture of at least three individuals. George P. Woodard (item 23) is **included** as a possible contributor to this mixed DNA profile. Based on the U.S. population, 1 in 2 individuals is a potential contributor to this DNA profile.

3) The DNA typing profile obtained from the blue sweatshirt (item 4, sample 4.B) is a mixture of at least four individuals. George P. Woodard (item 23) is included as a possible contributor to this mixed DNA profile. Based on the U.S. population, 1 in 7 individuals is a potential contributor to this DNA profile.

Teresa Shank — 04.29.09

Teresa Shank, Forensic Scientist — Date

CRIME LABORATORY REPORT

Agency: Lewis County Sheriff's Office
Agency Rep: Detective Jamey McGinty
Subject: Victim – [redacted]
Subject: Suspect – Woodard, George P.

COPY

Laboratory Number: 509-000053
Agency Case Number: 08C15792
Request Number: 0003

4) The DNA typing profile obtained from the blue sweatshirt (item 4, sample 4.C) is a mixture of at least three individuals. George P. Woodard (item 23) is included as a possible contributor to this mixed DNA profile. Based on the U.S. population, 1 in 6 individuals is a potential contributor to this DNA profile.

5) The DNA typing profile obtained from the black underwear (item 5) is a partial DNA profile consistent with the profile of George P. Woodard (item 23).

Remarks

Statistical calculations were computed by CODIS Popstats using frequency data compiled by the FBI and published in the *Journal of Forensic Sciences*, Vol. 46, Number 3, May 2001, pp. 453-489.

The submitted item was resealed and returned to the Washington State Patrol Vancouver Crime Laboratory evidence vault pending return to the submitting agency.

Teresa Shank

Teresa Shank, Forensic Scientist

04.29.09

Date

Appendix D

Amended Information

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR LEWIS COUNTY

STATE OF WASHINGTON, Plaintiff, vs. GEORGE PATRICK WOODARD, DOB: 07/28/1965 Defendant.	No. 08-1-00876-7 AMENDED INFORMATION

COUNT I - KIDNAPPING IN THE FIRST DEGREE

By this Information the Prosecuting Attorney for Lewis County accuses the defendant of the crime of KIDNAPPING IN THE FIRST DEGREE, which is a violation of RCW 9A.40.020(1)(b), the maximum penalty for which is life in prison and a $50,000 fine, in that defendant on or about December 24, 2008, in Lewis County, Washington, did intentionally abduct another person to wit: M.M.P. (DOB: 11-16-1996) to facilitate the commission of any felony or flight thereafter; contrary to Revised Code of Washington 9A.40.020(1)(b); against the peace and dignity of the State of Washington.

And further, that the defendant committed the crime with sexual motivation, i.e., that one of the purposes for which the defendant committed the crime was for the purpose of his sexual gratification; as provided, proscribed and defined by RCW 9.94A.030, RCW 9.94A.127 or RCW 9.94A.835.

MICHAEL GOLDEN
LEWIS COUNTY
PROSECUTING ATTORNEY
360 NW NORTH ST MS : PRO01
CHEHALIS, WASHINGTON 98532-1900
(360) 740-1240
FAX (360) 740-1497

COUNT II - RAPE OF CHILD IN THE SECOND DEGREE

And I, the Prosecuting Attorney aforesaid, further do accuse the defendant of the crime of RAPE OF CHILD IN THE SECOND DEGREE, which is a violation of RCW 9A.44.076, the maximum penalty for which is life in prison and a $50,000 fine, in that defendant on or about December 24, 2008, in Lewis County, Washington, then and there did have sexual intercourse with M.M.P. (DOB: 11-26-1996) who was at least twelve years old but less than fourteen years old and not married to the defendant and the defendant was at least thirty-six months older than M.M.P. (DOB: 11-26-1996); contrary to the Revised Code of Washington 9A.44.076; against the peace and dignity of the State of Washington.

COUNT III – CHILD MOLSESTATION IN THE SECOND DEGREE

And I, the Prosecuting Attorney aforesaid, further do accuse the defendant of the crime of CHILD MOLESATION IN THE SECOND DEGREE, which is a violation of RCW 9A.44.086, the maximum penalty for which is ten (10) years in prison and a $20,000 fine, in that the above-named Defendant on or about December 24, 2008, in Lewis County, Washington, being at least thirty-six (36) months older than M.M.P. (DOB: 11-26-1996) , had sexual contact with M.M.P. , who was at least twelve (12) years old but less than fourteen (14) years old, and not married to the defendant; contrary to Revised Code of Washington 9A.44.086.

//
//
//
//
//
//
//

MICHAEL GOLDEN
LEWIS COUNTY
PROSECUTING ATTORNEY
345 W. Main Street, 2nd Floor
CHEHALIS, WASHINGTON 98532-1900
(360) 740-1240
FAX (360) 740-1497

Dated: 07/09/2009

MICHAEL GOLDEN
Prosecuting Attorney

By: _____
THEODORE M. MILLER, WSBA# 39069
Deputy Prosecuting Attorney

MICHAEL GOLDEN
LEWIS COUNTY
PROSECUTING ATTORNEY
345 W. Main Street, 2nd Floor
CHEHALIS, WASHINGTON 98532-1900
(360) 740-1240
FAX (360) 740-1497

Appendix E

Cover Letter From Dr. Deborah Hall

Δ Woodard, George 08C-15792 TMM
081-00876-7

Sexual Assault Clinic
413 Lilly Road N.E.
Olympia, WA 98506
Fax 360-459-2023
Tel **360 493-7469**

PROVIDENCE
St. Peter
Hospital

Protected Health Information Enclosed
Protected Health information is personal and sensitive information related to a person's healthcare. It is being sent to you after appropriate authorization from the patient, patient's parent or guardian or under circumstances that do not require patient authorization.
You, the recipient, are obligated to maintain it in a safe, secure and confidential manner. Re-disclosure without additional consent is prohibited, except as permitted by law. Unauthorized re-disclosure or failure to maintain confidentiality could subject you to penalties described in federal and state law.

January 7, 2009

To: Detective Sue Shannon, Lewis County Sheriff's Office

Patient: M[redacted] P[redacted] **Age 12** **DOB:** [redacted]

Enclosed is a copy of the Clinic medical evaluation regarding the child shown above. Our reports are sent according to the Consent for Release of Confidential Information, as signed by a parent or by the child's guardian.

A copy may also be mailed to another agency, such as law enforcement, Child Protective Services, family physician, a guardian ad litem, or an attorney. These reports can be explicit and should be treated with utmost confidentiality.

If this patient was interviewed as a part of medical care and made a disclosure about an abuse, an audio file may be provided upon request. This patient may have colposcopic film on file which could be reproduced if findings are pertinent to a legal proceeding.

This examination was paid for in part by Washington State Crime Victims' Compensation Program. The remaining balance is covered by Providence St. Peter Hospital. Charges will not be billed to the patient or to their insurance carrier.

If you have any questions about the clinic evaluation, please contact me.

DHallom

COPY

Deborah K. Hall, MD
Medical Director
Sexual Assault Clinic

CC: Blair 1-30-09

Appendix F

Curriculum Vitae of Lisa Wahl, ARNP, FNP, NP-C

Lisa G. Wahl, ARNP, FNP, NP-C
360-493-7469

EDUCATION/EXPERIENCE

San Jose State University, San Jose, California – BSN 2000
University of Alaska, Anchorage, Anchorage, Alaska – MSN 2006
Dominican Hospital, Santa Cruz, CA, Neuro-Respiratory Staff RN - 2000-2001
Providence Alaska Medical Center, Anchorage, AK –
Student Preceptor, Oncology, Medical Surgical Staff/Charge RN;
Emergency Center Staff RN 2001-2007
Locum Tenens: Providence Alaska Medical Center Child Maltreatment
Army ROTC Ft Lewis

PROFESSIONAL ACCREDITATION AND CERTIFICATIONS

State of Alaska: RN, Advanced Nurse Practitioner
State of Washington: RN, Advanced Registered Nurse Practitioner
DEA: Controlled Substance Registration Certificate
American Academy of Nurse Practitioners, Board certified

PRESENT EMPLOYMENT

Providence St. Peter Hospital, Sexual Assault Clinic, ARNP
Providence St. Peter Hospital, Sexual Assault Nurse Examiner
Providence Chemical Dependency Center, ARNP

PERTINENT TRAINING & CONTINUING MEDICAL EDUCATION

TNCC, 2008 ACLS, 2008
ENPC, 2007 PALS, 2008

- Effective Team Investigations of Child Abuse, Criminal Justice Training, 20 CME, April, 09
- Children's Justice Conference, DSHS Children's Administration, 12 CME, April, 2009
- Northwest Child Maltreatment Peer Review/Advanced SANE Training, 20 CME credits/yr: Quarterly professional meetings for Review of literature, medical colposcopy, cases of child maltreatment & sexual assault forensics. Attendance: 9-07 – current: 2009
- Pediatric Behavioral Health Care, PSPH, WA State Medical Assoc. 4 CME February 2009
- Child Abuse Summit/Family Violence Conference, Clackamas Co. Sheriff & Kaiser-Legacy Emanuel Hospital, Portland-Advanced Medical Training: 22.5 CME hours; April 22-25, 2008
- Darkness to Light – Stewards of Children Facilitators Workshop; March 21, 2008
- Harborview Medical Center Education and Training:
  Sexual Assault Nurse Examiner Core Training, 40 hours; Sept 17-21, 2007
- Olympia Emergency Services, Providence St. Peter Hospital Emergency Center
  ARNP Emergency Center Training, 90 contact hours; October 2007
- San Diego, CA; Clinical Forensic Medical Training Center:
- Pediatric Sexual Abuse Training, 28 contact hours; November 2007

SPECIFIC AREAS OF EXPERTISE

Pediatrics - Medical Findings of Sexual Assault and Physical Abuse of Children & Adolescents; Medical Interviews of Children
Forensics - Exam and Evidence Collection of Sexual Assault
Basic Care of Health Management Illness - Prenatal to Gerontology

I am available to discuss any issues related to my pending testimony.

NUMBER OF CHILD SEXUAL ASSAULT EXAMS, WELL-CHILD EXAMS & MEDICAL HISTORY INTERVIEWS OBSERVED PRIOR TO CREDENTIALING: 16

NUMBER OF CHILD SEXUAL ASSAULT & ADULT RAPE EVALUATIONS TO DATE: 177

7/22/09 cc: Blair

Appendix G

Appellant's Opening Brief

COA No. 40293-9-II

NO. 40293-9-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

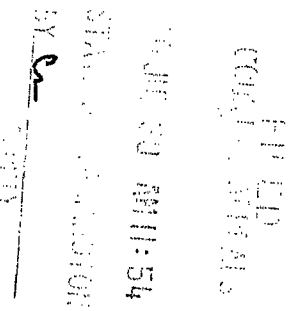
STATE OF WASHINGTON,

Respondent,

v.

GEORGE WOODARD,

Appellant.



ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR LEWIS COUNTY

APPELLANT'S OPENING BRIEF

NANCY P. COLLINS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Washington Court of Appeals Decisions

United States Supreme Court Decisions

Federal Decisions

United States Constitution

Washington Constitution

Statutes

Court Rules

Other Authorities

A. ASSIGNMENTS OF ERROR.

1. Woodard's multiple convictions and sentences for kidnapping in the first degree predicated on facilitating rape or child molestation, as well as both underlying offenses, violate the state and federal constitutional prohibitions against double jeopardy.

2. Woodard's conviction for child molestation in the second degree violates double jeopardy and the right to a unanimous jury verdict under the Fifth Amendment and Article I, sections 9 and 22 of the Washington Constitution.

3. The court impermissibly demanded that the jury rest its special verdict finding of sexual motivation on unanimous agreement when unanimity is only required if the jury finds the State has proven this aggravating factor.

4. The introduction of prior bad acts that were explicitly barred by the court's pretrial rulings denied Woodard a fair trial.

5. The trial court's communication with the deliberating jury without consulting counsel or Woodard denied Woodard his rights to counsel and to be present under the Sixth Amendment and due process clause of the Fourteenth Amendment, as well as the Washington Constitution, article I, sections 3 and 22.

6. The trial court deprived Woodard the equal protection guaranteed by the Fourteenth Amendment to the United States Constitution and article I, section 12 of the Washington Constitution, when the court, and not a jury, found the facts necessary to sentence him as a persistent offender.

7. The failure to file findings of fact following a contested CrR 3.5 hearing denies Woodard his right to meaningfully appeal from the court's order.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The double jeopardy clauses of the federal and state constitutions protect against multiple prosecutions and multiple punishments for the same offense. Woodard's conviction for first degree kidnapping was elevated to a higher degree by his convictions for the underlying offenses of second degree rape of a child and second degree child molestation. Where the offenses occurred in a single, short time frame, without any separate injury, do his convictions for the multiple crimes violate the Double Jeopardy Clause of the Fifth Amendment and the Washington Constitution, article I, section 9?

2. A jury's verdict for one crime must rest on the unanimous determination that the State has proven a single act and that act

must be separate and distinct from the act used to punish the same behavior in another conviction. Where the jury was never instructed that its verdict for second degree child molestation must rest on unanimous agreement as to a single act separate from an act used to convict Woodard of a different crime, does the verdict violate double jeopardy and the requirement of juror unanimity?

3. A jury does not need to be unanimous in a special verdict finding when it determines that the State has not met its burden of proof. The trial court instructed the jury that it could not find the State had failed to meet its burden of proof unless it reached this decision unanimously. Where the deliberative process requires accurate instructions on the requirement of unanimity, does the incorrect instruction undermine the jury's special verdict finding?

4. A court properly excludes allegations of highly prejudicial and unrelated prior acts by ordering that witnesses must be instructed not to offer such unduly prejudicial, irrelevant, accusations against a person charged with a crime. The prosecution's witnesses ignored the court's plain directive and testified about prohibited allegations against Woodard. Where the prejudicial nature of other conduct cannot be erased once placed before the jury, was Woodard denied a fair trial by the State's

witnesses testimony about uncharged, prejudicial, and irrelevant conduct?

5. The court may not communicate with a deliberating jury, particularly in the absence of counsel and when the content of the communication pertains to substantive legal and factual issues. When the court answered the jury's question about the facts underlying one of the charges without consulting with counsel or Woodard, did the court's communication affect jury deliberations, deny Woodard his right to the assistance of counsel, and constitute a stage of the proceedings at which Woodard was denied the right to be present?

6. The Equal Protection clauses of the Fourteenth Amendment to the United States Constitution and Article I, section 12 of the Washington constitution require that similarly situated people be treated the same with regard to the legitimate purpose of the law. With the purpose of punishing more harshly recidivist criminals, the Legislature has enacted statutes authorizing greater penalties for specified offenses based on recidivism. In certain instances, the Legislature has labeled the prior convictions 'elements,' requiring they be proven to a jury beyond a reasonable doubt, and in other instances has termed them 'aggravators' or

'sentencing factors,' permitting a judge to find the prior convictions by a preponderance of the evidence. Where no rational basis exists for treating similarly-situated recidivist criminals differently, and the effect of the classification is to deny some recidivists the Sixth and Fourteenth Amendment protections of a jury trial and proof beyond a reasonable doubt, does the arbitrary classification violate equal protection?

7. Under CrR 3.5, a court must enter written findings of fact and conclusions of law following a hearing on the admissibility of statements of the accused. The court never issued a final oral ruling in the case at bar and never filed written findings. Does the court's failure to file written findings, combined with the absence of a complete oral ruling, deny Woodard his right to appeal from the court's CrR 3.5 ruling?

C. STATEMENT OF THE CASE.

On December 24, 2008, Dallas Hazelrigg had just been released from jail and arranged to spend a few days at the home of George Woodard, so he and his family could be together. 2ARP 81; 3RP 24. Hazelrigg's wife Wendy Galloway was staying at the local women's mission with her 12-year-old daughter M.P. and her son Jordan. 2ARP 89; 3RP 14-15. During the day, Hazelrigg, his

brother Wayne, Galloway, and Woodard drove around in an effort to post bail for a friend Hazelrigg met in jail, in order to help Hazelrigg earn some money. 2ARP 108; 3RP 25.

M.P. spent the day with her friend Kirsten Pendergast and Pendergast's young child. 3RP 30. Once Hazelrigg earned several hundred dollars as a payment for posting his jail acquaintance's bail, Galloway told M.P. she needed to visit with her family and brought M.P. to Woodard's home. 2ARP 108; 3RP 30. At about 7:30 p.m., M.P. wanted to buy a snack from the grocery store, which would close at eight o'clock. 2ARP 125; 3RP 16. Either Hazelrigg or M.P. asked Woodard to take M.P. to the store. 2ARP 36-38; 5RP 33. Hazelrigg himself could not take M.P. to the store because he was taking his brother Wayne to buy drugs and he understood it was inappropriate to bring M.P. on such a journey. 2ARP 81, 83.

Woodard drove M.P. to the grocery store and waited in the car while she bought her snack. 2BRP 15. Woodard agreed he was testing his car's ability to turn in the parking lot, doing "brodies," or "donuts"[1] but denied that any inappropriate action

[1] Meaning to create a circular pattern by rotating tires. See http://en.wikipedia.org/wiki/Donut_(driving).

followed and told the police and the jurors at trial that he drove M.P. home from the store without further incident. 5RP 34, 41.

According to M.P., Woodard drove a different route home because he wanted to show M.P. that his recently purchased car could do "donuts" in the snow. 2BRP 20. After doing a "donut," Woodard stopped the car and ordered M.P. into the back seat. 2BRP 22. He put his mouth on the outside of her sweatshirt near her breast and on the outside of her vagina, and also penetrated her vagina with his finger and penis. 2BRP 22-29. Then he drove M.P. back to his home, where both her parents were. 2BRP 29; 3RP 18. M.P. did not tell anyone that anything had happened when she returned to her parents. 2ARP 85, 88. She said the store had a long line to explain why she was gone for about 30 minutes. 3RP 19. She laughed at Woodard when he fought with someone else in an unrelated argument. 2BRP 44. Then M.P. asked to spend the night at her friend Kirsten's house, where she had spent the day. 2BRP 43.

The next day, M.P. told Kirsten Pendergast and her parents that Woodard had sexually assaulted her. 2BRP 48; 3RP 22, 34. Lewis County police officer Susan Shannon took M.P. to the hospital for a "rape kit." 3RP 55. DNA analysis of samples taken

from M.P. and her clothing did not contain evidence connected to Woodard, other than a small amount of saliva on the sweatshirt M.P. wore. 4RP 127, 143-45. Woodard explained that the sweatshirt belonged to his son and he had lent it to M.P. because she had no coat. 4RP 134; 5RP 35-36.

The prosecution charged Woodard with one count of first degree kidnapping with sexual motivation, rape of a child in the second degree, and child molestation in the second degree. CP 13-14. He was convicted of the charged offenses. CP 53-57. The court found he had one qualifying prior conviction under the "two strikes" life sentence law and imposed a sentence of life without the possibility of parole. 5RP 172-73. Pertinent facts are addressed in further detail in the relevant argument section below.

D. ARGUMENT.

1. BY ELEVATING KIDNAPPING TO A HIGHER DEGREE BASED ON THE COMMISSION OF OTHER OFFENSES, IMPOSING MULTIPLE PUNISHMENTS FOR THE INTERRELATED OFFENSES IN ADDITION TO FIRST DEGREE KIDNAPPING VIOLATES DOUBLE JEOPARDY

Woodard was charged with and convicted of kidnapping in the first degree. The sole element increasing the level of kidnapping to a first degree offense was that the kidnapping

occurred for the purpose of facilitating the underlying offenses of rape of a child in the second degree and child molestation in the second degree during the same, single, half-hour period. Woodard was also separately punished for those two underlying offenses regarding the same, singular incident. This pyramiding of charges based on the same conduct violates the constitutional prohibition against double jeopardy.

a. Double jeopardy is violated when separate punishments are imposed for the same offense. The double jeopardy clauses of the state and federal constitutions protect against multiple punishments for the same offense. Blockberger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932); In re Personal Restraint of Orange, 152 Wn.2d 795, 816, 100 P.3d 291 (2004); U.S. Const. amend. 5; Const. art. I, § 9. "Double jeopardy concerns arise in the presence of multiple convictions, regardless of whether resulting sentences are imposed consecutively or concurrently." State v. Womac, 160 Wn.2d 643, 657, 160 P.3d 40 (2007).

A conviction and sentence violate double jeopardy if, under the "same evidence" test, the two crimes are the same in law and fact. Orange, 152 Wn.2d at 816; State v. Adel, 136 Wn.2d 629,

632, 965 P.2d 1072 (1998). A double jeopardy violation occurs when, absent clear legislative intent to the contrary, the evidence required to support a conviction for one would have been sufficient to warrant a conviction for the other. Orange, 152 Wn.2d at 816. The test is not simply whether two offenses have different statutory elements. United States v. Dixon, 509 U.S. 688, 712, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993) (conviction for criminal contempt barred prosecution for drug offense); Brown v. Ohio, 432 U.S. 161, 164, 100 S.Ct. 2221, 53 L.Ed.2d 187 (1977) ("separate statutory crimes need not be identical either in constituent elements or actual proof in order to be the same within the meaning of the constitutional prohibition").

As explained in Orange, proper application of the Blockberger same elements test is focused specifically on "the facts used to prove the statutory elements" rather than comparing generic statutory language. 152 Wn.2d at 818-19. For example, convictions for rape and rape of a child based on the same act violate double jeopardy even though "the elements of the crimes facially differ." State v. Hughes, 166 Wn.2d 675, 684, 212 P.3d 558 (2009).

When discerning legislative intent, the United States Supreme Court requires an express statement of the legislature's purpose to permit separate punishments. Whalen v. United States, 445 U.S. 684, 691-92, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980). For example, an express statement of legislative intent exists where a statute authorizes courts to punish a burglary separately from another crime committed incidentally to the burglary. RCW 9A.52.050. If there is doubt about the legislature's intent, principles of lenity require the interpretation most favorable to the defendant. Whalen, 445 U.S. at 694.

b. First degree kidnapping merges with the underlying predicate offenses. Under the merger doctrine, when a particular degree of crime requires proof of another crime, the court presumes the legislature intended to punish both offenses singly. See State v. Freeman, 153 Wn.2d 765, 772-73, 108 P.3d 753 (2005); State v. Johnson, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979). A separate conviction for the included crime will not stand unless it involved an injury to the victim that is separate and distinct from the greater crime. Johnson, 92 Wn.2d at 680.

In Johnson, the defendant was charged with kidnapping, assault, and rape. The offenses occurred during a single,

prolonged incident, where the defendant bound his victim and threatened her before and during the rape. "[T]he restraints [underlying the kidnapping]and use of force [underlying the assault] were elements which elevated the acts of sexual intercourse to rape in the first degree." Id. at 681. The offenses were also essentially contemporaneous and "the sole purpose of the kidnaping and assault was to compel the victims' submission to acts of sexual intercourse." Id.

The Johnson Court concluded that imposing convictions and sentences for all three offenses unjustly multiplied the punishments for a single offense. Id. at 680. When conduct that is involved in a rape has no independent purpose or effect other than enabling the sexual assault, "the legislature intended" that it should not be punished as a separate crime. Id. at 676.

Like Johnson, the State pyramided charges by prosecuting Woodard for first degree kidnapping, which its defined as the intent to facilitate rape of a child in the second degree and/or child molestation in the second degree, in addition to the underlying offenses of rape and child molestation, without an independent purpose and effect. The court must presume the legislature intended to punish these offenses singly when there was no

separate and distinct injury inflicted. This imposition of multiple punishments for the same acts violates double jeopardy.

c. The "kidnapping" was elevated by the underlying offenses and yet caused no separate harm meriting multiple punishments. The elements of first degree kidnapping as charged and set forth in the "to convict" instruction provided that the State must prove Woodard abducted the complainant, "with the intent to facilitate the commission of rape of a child in the second degree and/or child molestation in the second degree, or flight thereafter." CP 36 (Instruction 6); RCW 9A.40.020(1)(b). The intent to facilitate these specific offenses aggravated the seriousness of the kidnapping charge to a higher degree.[2]

As charged and proven in the case at bar, the facts underlying the kidnapping constituted the minimum restraint necessary for the sexual assaults. Woodard took the complainant on a detour as they headed home after going to the grocery store. Woodard drove one or two minutes[3] in a different direction to show the complainant how his car could do a "donut" in the snow. 2BRP

[2] The lesser degree of second degree kidnapping requires an intentional abduction "under circumstances not amounting to kidnapping in the first degree." RCW 9A.40.030(1).

20. He stopped the car at a cul de sac and began the sexual assault. The cul de sac was not in a remote area. 2BRP 19-20. People lived in nearby homes, the complainant was familiar with the area, and many other cars had gone to the same place to do "donuts" in the snow, as shown by a number of tire tracks found by police. 3RP 126; 5RP 60.

Illustrating the incidental nature of the restraint, the prosecutor argued to the jury, "Let's face it, if somebody is going to have sex with a 12 year-old, are they going to do it in the middle of North Pearl Street and Market? You are going to go to a place where nobody is going to see you." 5RP 88. Taking the complainant to a location off the main street was what was expected of a sexual assault and part of the nature of the offense; it should not constitute a separate crime.

When the sexual assault ended, the complainant sat in the front passenger seat, buckled her seat belt, and Woodard drove her back to the trailer where he lived and where she was staying with her parents. 2BRP 29. The manner of the restraint was not separately severe or injurious. Its purpose was to commit the

---

[3] Police detective Shannon timed the route the day after the incident, driving in the same manner as the complainant reported Woodard drove, and it took her one to two minutes each way. 3RP 103

sexual assaults. Consequently, the kidnapping, rape, and child molestation punishments violate double jeopardy, because they are based on the same factual occurrence and legal elements.

d. The double jeopardy violation requires the court to strike the multiple punishments. The proper remedy for a double jeopardy violation is to vacate the lesser conviction. State v. League, 167 Wn.2d 671, 223 P.3d 493 (2009). The lesser conviction is the offense that forms part of the proof of the other. Id.; Freeman, 153 Wn.2d at 777. The elevation of the kidnapping based on the intent to commit rape of a child and child molestation elevates the seriousness of kidnapping and requires vacation of the lesser offenses that form the basis for the greater. Johnson, 92 Wn.2d at 682.

2. THE MULTIPLE ACTS UNDERLYING THE ALLEGATION OF CHILD MOLESTATION DENIED WOODARD HIS RIGHTS TO BE FREE FROM DOUBLE JEOPARDY AND TO HAVE A UNANIMOUS JURY VERDICT

a. The jury must unanimously find the State proved separate acts when the State seeks multiple convictions for the same conduct. Due process requires the prosecution to prove, beyond a reasonable doubt, all essential elements of a crime for a conviction to stand. In re Winship, 397 U.S. 358, 364, 90 S.Ct.

1068, 25 L.Ed.2d 368 (1970); State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 396 (1995); U.S. Const. amends. 5, 14; Wash. Const. art. I, §§ 3, 21, 22. The right to a unanimous jury verdict demands the jury verdict reflects a unanimous finding of the act or acts underlying the charged offense. See Apprendi v. New Jersey, 530 U.S. 466, 498, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (Scalia, J. concurring) (charges must be proved "beyond a reasonable doubt by the unanimous vote of 12 of his fellow citizens"); Blakely v. Washington, 542 U.S. 296, 301, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) ("longstanding tenet" of criminal law jurisprudence is "the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours.'" (quoting 4 W. Blackstone, Commentaries on the Laws of England, 343 (1769)).

In Washington, the state constitutional right to a trial by jury "provides greater protection for jury trials than the federal constitution." State v. Williams-Walker, 167 Wn.2d 887, 895-96, 225 P.3d 913 (2010); Wash. Const. art. I, §§ 21, 22. The jury's verdict must explicitly authorize the punishment imposed. 167 Wn.2d at 900. Punishment sought by the State "must not only be alleged, it also must be authorized by the jury" in its verdict. Id.

b. The jury was not instructed that it must rest its verdict for count 3 on unanimous agreement of a specific act, separate from that underlying count 2. A violation of the right to jury unanimity occurs when the defendant is accused of several counts of the same offense but the jurors were not expressly instructed that each conviction must rest on a "separate and distinct act or event." State v. Carter, __ Wn.App. __, 2010 WL 2590552 (June 25, 2010); State v. Berg, 147 Wn.App. 923, 935, 198 P.3d 529 (2008); State v. Borsheim, 140 Wn.App. 357, 368, 165 P.3d 417 (2007).

Jury instructions must make the unanimity requirement manifestly apparent to the average juror. Carter, 2010 WL 2590552 at *3. Unless the instructions unambiguously direct the jury that its verdict must rest on separate acts, the accused person has been exposed to the possibility of multiple punishments for the same criminal conduct, contrary to the bar against double jeopardy. Id.

In Berg, the defendant was charged with two counts of third degree child molestation occurring during the same period of time, and the court instructed the jury that its verdict must be unanimous

as "to one particular act." 147 Wn.App. at 934. But the Court of Appeals held,

> as in Borsheim, the trial court here did not give a "separate and distinct act" instruction or otherwise require that the jury base each charged count on a "separate and distinct" underlying event. And as in Borsheim the missing language potentially exposed Berg to multiple punishments for a single offense. Accordingly, we reverse and order the trial court to vacate one of the third degree molestation convictions.

Id. at 935.

In Carter, the complainant testified she was raped 40 to 50 times over a certain time period and Carter was charged with four counts of rape of a child. 2010 WL 2590552 at *1. The court gave a unanimity instruction but no instruction on the requirement of separate and distinct acts. Following Berg, this Court held that the instructions "exposed Carter to the possibility of multiple convictions for the same criminal act. Thus, we remand with instructions to dismiss three of the four child rape counts." Id. at *3.

Here, the court gave a unanimity instruction that applied only to the rape in the second degree charge in count 2. The court gave no instructions to the jury that they must rest a conviction for child molestation based upon unanimous agreement of the same act, and that the act must be separate and distinct from the act of

sexual contact used in a conviction for count 2, rape in the second degree. Instruction 14 told the jury that there were allegations of separate acts that could constitute second degree rape of a child, and "you must unanimously agree as to which act has been proved." CP 44. No instruction explained the "separate and distinct" finding required by the constitutional prohibition against double jeopardy, and the unanimity instruction explicitly applied only to the charge of second degree rape of a child. The lack of a unanimity instruction regarding the child molestation charge violated double jeopardy as explained by this Court.

c. The allegations at trial included various acts that a juror could use to convict Woodard. Second degree child molestation requires an act of "sexual contact," defined in the jury instructions as "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party." CP 43 (Instruction 13); RCW 9A.44.010(2). Several alleged acts could have potentially constituted sexual contact, including touching the complainant's sweatshirt in the area of her breast, touching the outside of her vagina, using a finger to touch the inside of her vagina, and penetrating the complainant in sexual intercourse. See e.g., State v. Adams, 24 Wn.App. 517, 519, 601

P.2d 995 (1979) (contact with breast through clothing could be "sexual contact" under certain circumstances).

Whether Woodard touched the complainant's breast was plainly considered by the jury as a possible basis for conviction. The sole question the deliberating jury asked the court was whether sexual contact as defined in Instruction 13 included the "bare and/or covered breast?" CP 52. The court responded by telling the jury to reread its instructions. Id.

The prosecution did not unambiguously elect the touching of the complainant's breast as the factual predict for this charge and mentioned the various alleged acts in its closing argument. 5RP 91-93, 118. The prosecution emphasized that the complainant accused Woodard of putting his mouth on the outside of her vagina, as well as the forensic evidence showing Woodard's saliva was on the sweatshirt the complainant wore, potentially corroborating the claim that his mouth touched the area of her breast.[4] 5RP 91-93. Even if the prosecution's closing argument had focused on a single act as the basis of its child molestation prosecution, the jury was instructed not to rely on the arguments of

[4] The sweatshirt belonged to Woodard, not the complainant, and thus the presence of his saliva on the sweatshirt was not clearly inculpatory. 5RP 35-36.

counsel and argument alone would not prove the basis of the jury's general verdict. State v. Kier, 164 Wn.2d 798, 813, 194 P.3d 212 (2008).

The latter two accusations involving penetration were also the basis of the rape charge. While rape requires some penetration, child molestation is more broadly defined to include "any touching" in a sexual manner. 5RP 91 (prosecutor's closing argument explaining child molestation is "very similar" to rape but only requires "sexual contact"). Child molestation includes the same acts as could constitute rape, although the two offenses have different mental elements. See State v. French, 157 Wn.2d 593, 610, 141 P.3d 54 (2006). The jurors had numerous acts before it that could constitute the factual predicate for child molestation, and yet they were never instructed that they must unanimously agree upon the proof of a certain act, distinct from an act used as the basis of a verdict in count 2.

d. The failure to ensure the verdict in count 3 rests on unanimous agreement as to an act separate from the basis for count 2 requires reversal. The remedy for submitting various allegations to the jury that could constitute the basis for a charge of child molestation and failing to insist that the jury unanimously

agree to an act separate and distinct from the act underlying another count requires reversal with an order to vacate one of the convictions. Berg, 147 Wn.App. at 935; Borsheim, 140 Wn.App. at 371. The child molestation conviction must be reversed and vacated due to the double jeopardy violation. See Womac, 160 Wn.2d at 657.

3. THE COURT GAVE A FATALLY FLAWED UNANIMITY INSTRUCTION FOR THE AGGRAVATING FACTOR USED IN THE SPECIAL VERDICT FORM

a. The court must properly instruct the jury on the unanimity required for an aggravating circumstance. When the jury is asked to make an additional finding beyond the substantive offense, the jury need not be unanimous to vote "no," and find the State has not sufficiently proven the aggravating factor. State v. Bashaw, _ Wn.2d _, 2010 WL 2615794 (July 1, 2010); State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003). In Bashaw and Goldberg, the jurors were told that their answer in a special verdict form, addressing an additional aggravating factor, must be unanimous for either a "yes" or "no" answer. Bashaw, 2010 WL 2615794 at *2; Goldberg, 149 Wn.2d at 894. The Supreme Court

held that such an instruction is incorrect, and unanimity is required only when the jury answers "yes."

> The rule from Goldberg[5] then, is that a unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding increasing the defendant's maximum allowable sentence.

Bashaw, at *6.

The jury instruction given in Bashaw for the special verdict form told the jurors, "Since this is a criminal case, all twelve of you must agree on the answer to the special verdict." Id. at *2. The Bashaw Court held that jurors need not be unanimous in a special finding. Rather, any jury's less than unanimous verdict "is a final determination that the State has not proved that finding beyond a reasonable doubt." Id. at *5.

Similarly to Bashaw, the trial court told Woodard's jury that their special finding must be unanimous to decide the sexual motivation aggravating factor either "yes" or "no." The court's instruction stated in pertinent part,

---

[5] In Goldberg, when the jury was not unanimous in its finding on an aggravating factor in a first degree murder prosecution, the trial court instructed the jury to continue deliberations and reach a unanimous verdict, either "yes" or "no." 149 Wn.2d at 891. After further deliberations, the jury returned with a unanimous verdict favoring the aggravating factor. Id. at 892. The Supreme Court reversed, ruling that the trial court erred by insisting on unanimity to answer a special verdict form. Id. at 894.

> Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form. In order to answer the special verdict form "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no."
>
> Because this is a criminal case, all twelve of you must agree to return a verdict. When you all have so agreed, fill in the verdict form to express your decision.

CP 50-51 (Instruction 20).

The jury instruction in the case at bar presents the identical error identified in Bashaw. The court erroneously told the jury that they could not vote "no" unless they were unanimous in finding the State had not proven this special verdict.

b. The clearly incorrect jury instruction requires reversal of the special verdict. The court in Bashaw characterized the problem as an error in "the procedure by which unanimity would be inappropriately achieved." 2010 WL 2615794, *7. This instructional error creates a "flawed deliberative process" and does not let the reviewing court simply surmise what the result would have been had it been given a correct instruction. Id. The Court in Bashaw looked to the example of the deliberative process in Goldberg, where several jurors had initially answered "no" to the special verdict, but after the trial judge told them they must be

unanimous, they returned with a "yes" finding on the aggravating factor. Id.

Where the trial court improperly insisted on a unanimous determination for a "no" finding, this Court "cannot say with any confidence what might have occurred had the jury been properly instructed," and cannot conclude that the error was harmless beyond a reasonable doubt. Id. As in Bashaw, the jury was incorrectly informed that their special verdict finding of sexual motivation must be unanimous. CP 20. This Court cannot guess as to the outcome of the case had the jury been correctly instructed and the special finding of sexual motivation must be vacated. Bashaw, 2010 WL 2615794 at *7.

4. TESTIMONY ABOUT WRONGFUL ACTS THAT WERE CLEARLY BARRED BY THE COURT'S PRE-TRIAL RULINGS DENIED WOODARD A FAIR TRIAL

a. The court properly barred irrelevant and highly prejudicial testimony about uncharged bad acts in its pretrial ruling. Uncharged wrongful acts are presumed to be too prejudicial to be admissible. ER 404(b)[6]; see State v. Rupe, 101 Wn.2d 664, 707-

[6] Under ER 404(b):
Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive,

08, 683 P.2d 571 (1984) (allegations defendant possessed uncharged firearms may be perceived with such disdain by jurors that it requires reversal).

Uncharged criminal conduct may be admitted into evidence only when it is materially relevant to an essential ingredient of the charged crime and its probative value outweighs its prejudicial effect. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1145 (2002); State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982); ER 404(b). Doubtful cases should be resolved in favor of the defendant. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

There are some types of information that a jury cannot be expected to disregard, such as a witness's claim that the accused person participated in a crime. Bruton v. United States, 391 U.S. 123, 135, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). As the Bruton Court recognized, a limiting instruction to disregard inculpatory evidence is the equivalent of asking a jury to perform, "a mental gymnastic which is beyond, not only their powers, but anybody's

---

opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

else." Id. at 132 n.8 (citing Nash v. United States, 54 F.2d 1006, 1007 (2nd Cir. 1932)); see also Dunn v. United States, 307 F.2d 883, 887 (5th Cir. 1962) ("If you throw a skunk in the jury box, you cannot instruct the jury not to smell it.").

Woodard moved to exclude the uncharged acts. First, Woodard explained that the prosecution should be bound by its failure to identify any ER 404(b) evidence it intended to introduce. 1RP 131; Supp. CP _, sub. no. 27 (Omnibus Order). Then Woodard voiced fears about several specific instances where the States's witnesses might inject improper allegations against Woodard. Two of the prosecution's witnesses, James Barnes and Jonathan Neff, were in jail with Woodard and they claimed Woodard told them he had sex with the complainant on six occasions in the past, unrelated to the charged offense. 1RP 131. The complainant denied these allegations and the prosecution agreed that it did not intend to introduce these claims of uncharged sexual acts. 1RP 131-32.

Not only did the prosecution agree that it did not plan on introducing allegations of other sexual activity involving the complainant, the prosecution specifically requested Woodard not mention any "sexual activity" involving M.P., either before or after

the charged incident. CP 25. The prosecution also requested that Woodard refrain from eliciting any testimony about any instances of drug or alcohol use by any witnesses, and Woodard agreed. CP 24; 1RP 120.

In addition to the prosecution's agreement that it would not purposefully introduce these uncharged and unproven allegations, defense counsel urged the court to order the prosecution to explicitly instruct its witnesses not to mention these claims. 1RP 132. The court also emphasized the importance of instructing the witnesses that they must abide by the court's evidentiary restrictions. 1RP 122. The prosecutor responded, "I can tell them. What they say is up to them, but I can at least inform them." 1RP 133.

In response to these arguments, the trial court issued several uncontested pretrial rulings. The court ruled that all of the State's witnesses should be instructed not to volunteer other accusations against Woodard that were not charged. 1RP 133-35. Woodard clarified that all witnesses should be instructed not to blurt out negative opinions or uncharged claims about Woodard. 1RP 136. The prosecution agreed provided it would be permitted to question witnesses if the defense opened the door. 1RP 137.

The court instructed the prosecution to tell all witnesses to exclude personal opinions of Woodard. 1RP 137. Additionally, the court expressly and repeatedly ordered the prosecution to convey its evidentiary rulings to its witnesses. 1RP 122, 133, 136.

b. The State's witnesses violated the court's unambiguous rulings barring unduly prejudicial evidence. As Woodard feared, when Barnes testified, he violated the court's order and told the jury that Woodard "bragged" that he had sex with the complainant six times before the charged incident on Christmas Eve. 4RP 68. The court ordered the jury to leave the courtroom and expressed frustration with this violation of the motion in limine. 4RP 68. The parties debated the effectiveness of an instruction to the jury and the court agreed that the "bell has been rung." 4RP 72-75. Woodard also moved for a mistrial due to the impossibility of instructing the jury to disregard this type of information, noting that jurors were paying attention and writing in their notes when the witness claimed Woodard had sexually assaulted the complainant on six other occassions. 4RP 72. Woodard noted that the witness was snickering when testifying about this claim. 4RP 72.

The court denied the mistrial and instructed the jury to disregard "the previous question and answer" without referencing

the information specifically and even though some time had passed since the jury heard the "previous" question and answer. 4RP 76.

After Barnes testified, the prosecution called a second witness from the jail, who was also in prison now for other offenses. In direct examination, Jonathan Neff claimed that Woodard said he was "smoking crack," right before the incident. 4RP 78. The defense moved for a mistrial after this comment, explaining that he did not object during the witness's testimony so he would not call undue attention to this prejudicial allegation. 4RP 86.

The court agreed that these two prosecution witnesses had violated its pretrial rulings, and it had reviewed the record to be certain of the scope of its rulings. 4RP 85. The court denied the mistrial motion. The court offered to tell the jury to disregard the evidence about drug use but Woodard decided that any further instructions from the court on the matter would only repeat the witness's testimony and would not cure the error. 4RP 85-86.

c. The witnesses' injection of highly prejudicial allegations regarding uncharged bad acts denied Woodard a fair trial. The prosecution called several witnesses even though it knew they would be reluctant to abide by the court's rulings barring certain allegations from being placed before the jury. 1RP 133. As

Woodard feared, these witnesses violated the court's pretrial rulings. Even the court agreed the bell had been rung and further instruction might not unring that bell.

The erroneous admission of ER 404(b) evidence requires reversal if the error, within reasonable probability, materially affected the outcome. State v. Everybodytalksabout, 145 Wn.2d 456, 469, 39 P.3d 294 (2002). This Court must assess whether the error was harmless by looking at the weight reasonably accorded this evidence, thus measuring the admissible evidence of guilt against the prejudice caused by the inadmissible testimony. Id.

Before trial, the court cautioned the prosecution against using highly inflammatory allegations without probative value against Woodard and told the State to make clear to its witnesses that no such information should be volunteered. 1RP 133-37. The State's witnesses disregarded this court order, and the trial judge agreed with Woodard that the witnesses had violated the terms of the court's pretrial rulings. 4RP 85.

Woodard saw the jurors taking notes and paying close attention when Barnes testified that Woodard bragged about having sex with the complainant on numerous occassions. 4RP 72. Immediately after Barnes inserted the highly inflammatory

claim about uncharged sexual assaults, Neff claimed Woodard had been smoking crack right before the incident as a further effort to paint Woodard as a dangerous person with criminal propensity. 4RP 68, 78. No instruction could erase these allegations from the forefront of the jury's thoughts.

The evidence against Woodard was not overwhelming. Although the complainant testified about a sexual assault, Woodard denied her claims consistently to police and at trial. Despite extensive forensic tests, the State only found Woodard's DNA on a sweatshirt that belonged to him. Furthermore, the complainant came from a troubled background, with her *de facto* father in jail or prison on several occasions and her mother living in a shelter. 2ARP 76-77; 2BRP 49-50; 3RP 24-26. She clearly preferred to spend her time with a girlfriend and the girlfriend's child than with her own family. 2BRP 43, 47; 3RP 29. She could have been motivated to concoct or exaggarate the allegations against Woodard based on her own desire to escape from an apparently difficult homelife. In light of the higly prejudicial nature of the uncharged allegations against Woodard, the witnesses' blatant and intentional violation of the court's pretrial orders denied Woodard a fair trial by jury.

5. THE COURT IMPERMISSIBLY COMMUNICATED WITH THE DELIBERATING JURY WITHOUT CONSULTING WOODARD OR COUNSEL

a. The trial court may not confer information to the deliberating jury and must consult with counsel when the jury has a substantive question. The discussion of a jury inquiry is a critical stage of a criminal proceeding at which a defendant has the right to be present and receive meaningful representation. Rogers v. United States, 422 U.S. 35, 39, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975); State v. Thomson, 123 Wn.2d 877, 880, 872 P.2d 1097 (1994); U.S. Const. amends. 5, 6, 14[7]; Wash. Const. Art. I, § 22[8]; CrR 3.4 (a). A trial court commits error when it communicates with the jury without notice to the defendant or counsel. State v. Caliguri, 99 Wn.2d 501, 509, 664 P.2d 466 (1983). CrR 6.15(f)(1) provides:

> After retirement for deliberation, if the jury desires to be informed on any point of law, the judge may require the officer having them in charge to conduct them into court. Upon the jury being brought into court, the information requested, if given, shall be given in the presence of, or after notice to the parties or their counsel. Any additional instruction upon any point of law shall be given in writing.

---

[7] The Fifth and Fourteenth Amendments protect the right to "due process of law," while the Sixth Amendment protects the right to "a speedy and public trial" with the assistance of counsel and right to confront witnesses.

[8] "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel . . . .'

There are some simple scheduling matters or pure legal discussions to which a defendant cannot meaningfully contribute and for which his presence is not constitutionally required. In re Pers. Restraint of Lord, 123 Wn.2d 296, 306, 868 P.2d 835 (1994) (conference on pretrial legal matter need not include defendant if no disputed facts involved). But aside from basic housekeeping details or technical legal questions, the defendant has the right to be present when a legal matter raises issues for which there are disputed facts or the defendant could potentially play a role in shaping the outcome. For example, the court in Lord agreed that a defendant has a right to be present during a hearing on the admissibility of a prior conviction. Id. (citing People v. Dokes, 595 N.E.2d 836, 839 (N.Y. 1992)). In Dokes, the court found that one key factor in assessing the right to be present is whether the proceedings involve factual matters "about which defendant might have peculiar knowledge that would be useful in advancing the defendant's or countering the [prosecution's] position." Id.

b. The trial court answered the jury's question without obtaining counsel's input and in Woodard's absence. The deliberating jury asked the court about the meaning of sexual

contact in Instruction 13. CP 52. The jury asked "Does this [definition of sexual contact] include bare and/or covered breast?" CP 52.

The jury submitted its question to the court at 4:10 p.m., and the court responded three minutes later. CP 52. The court told the jury "reread all your instructions." CP 52.

The court supplied this response to the jury's question without consulting with Woodard himself, his attorney, or the prosecution. There is no mention in the otherwise-detailed clerk's minutes of the presence of counsel or Woodard during this exchange. Supp. CP __, sub. no. 67.

c. The court was required to protect Woodard's right to counsel and to personally participate in the case. The record does not demonstrate the court protected or respected Woodard's right to be present and consult with counsel regarding the jury inquiry.

On occasion, courts have found a defendant need not be present during technical legal discussions or simply procedural matters such as scheduling. Lord, 123 Wn.2d at 306. But this jury inquiry was not administrative or purely legal because it related to

the facts of the case and the acts underlying the charge of child molestation.

As discussed above, the jury was not instructed that its verdict for second degree child molestation must be based on unanimous agreement as to a single or separate act from that underlying count two. The prosecution presented several acts that could constitute sexual contact. Had the attorneys and Woodard been consulted on this note from the jury, they would have seen that the jury was examining whether the touching of the breast should be considered as a predicate act for child molestation and could have given appropriate unanimity and separate and distinct instructions to the jury. Having failed to inform anyone of the inquiry, the court permitted the jury's verdict to violate double jeopardy.

d. The trial court's failure to include Woodard in its response to the jury inquiries requires reversal under the State and Federal Constitutions. The federal constitutional right to be present is culled from the rights to due process of law and to confront one's accusers, and if there is a violation of the right to be present, "the burden is on the prosecution to prove that the error was harmless beyond a reasonable doubt." United States v. Marks, 530 F.3d

759, 812 (9th Cir. 2008); State v. Rice, 110 Wn.2d 577, 613-14, 757 P.2d 889 (1988), cert. denied, 491 U.S. 910 (1989). But the Washington Constitution expressly declares a right to be present and thus more strictly requires the State to enforce this fundamental right. State v. Ahren, 64 Wn.App. 731, 735 n.4, 826 P.2d 1086 (1992).

The court's improper communication with the deliberating jury exacerbated the jury's failure to properly reach unanimous verdicts resting on separate and distinct acts, and therefore, cannot be harmless.

6. THE CLASSIFICATION OF THE PERSISTENT OFFENDER FINDING AS AN "AGGRAVATOR" OR "SENTENCING FACTOR," RATHER THAN AN "ELEMENT," VIOLATED WOODARD'S RIGHT TO EQUAL PROTECTION GUARANTEED BY THE FOURTEENTH AMENDMENT AND ARTICLE ONE, SECTION TWELVE OF THE WASHINGTON CONSTITUTION.

Even though under the Sixth and Fourteenth Amendments, all facts necessary to increase the maximum punishment must be proven to a jury beyond a reasonable doubt, Washington courts have declined to require that the prior convictions necessary to impose a persistent offender sentence of life without the possibility of parole be proven to a jury. State v. Smith, 150 Wn.2d 135, 143,

75 P.3d 934 (2003), cert. denied, Smith v. Washington, 124 S.Ct. 1616 (2004); State v. Wheeler, 145 Wn.2d 116, 123-24, 34 P.2d 799 (2001).

However, the Washington Supreme Court has recently held that where a prior conviction "alters the crime that may be charged," the prior conviction "is an essential element that must be proved beyond a reasonable doubt." State v. Roswell, 165 Wn.2d 186, 192, 196 P.3d 705 (2008). While conceding that the distinction between a prior-conviction-as-aggravator and a prior-conviction-as-element is the source of "much confusion," the Court concluded that because the recidivist fact in that case elevated the offense from a misdemeanor to a felony it "actually alters the crime that may be charged," and therefore the prior conviction is an element and must be proven to the jury beyond a reasonable doubt. Id. While Roswell correctly concludes the recidivist fact in that case was an element, its effort to distinguish recidivist facts in other settings, which Roswell termed "sentencing factors," is neither persuasive nor correct.

First, in addressing arguments that one act is an element and another merely a sentencing fact the Supreme Court has said "merely using the label 'sentence enhancement' to describe the

[second act] surely does not provide a principled basis for treating [the two acts] differently." Apprendi, 530 U.S. at 476. More recently the Court noted:

> Apprendi makes clear that "[a]ny possible distinction between an 'element' of a felony offense and a 'sentencing factor' was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding." 530 U.S. at 478 (footnote omitted).

Washington v. Recuenco, 548 U.S. 212, 220, 126 S.Ct. 2546, 165 L.Ed. 2d 466 (2006) (Recuenco II). Beyond its failure to abide the logic of Apprendi, the distinction Roswell draws does not accurately reflect the impact of the recidivist fact in either Roswell or the cases the Court attempts to distinguish.

In Roswell the Court considered the crime of communication with a minor for immoral purposes. Id. at 191. The Court found that in the context of this and related offenses,[9] proof of a prior conviction functions as an "elevating element," i.e., elevates the offense from a misdemeanor to a felony, thereby altering the substantive crime from a misdemeanor to a felony. Id. at 191-92. Thus, Roswell found it significant that the fact altered the maximum

possible penalty from one year to five. See RCW 9.68.090 (providing communicating with a minor for an immoral purpose is a gross misdemeanor unless the person has a prior conviction in which case it is a Class C felony); and RCW 9A.20.021 (establishing maximum penalties for crimes). Of course, pursuant to Blakely, the "maximum punishment" is five years only if the person has an offender score of 9, or an exceptional sentence is imposed consistent with the dictates of the Sixth Amendment. In all other circumstance "maximum penalty" is the top of the standard range. Indeed, a person sentenced for felony CMIP with an offender score of 3[10] would actually have a maximum punishment (9-12 months) equal to that of a person convicted of a gross misdemeanor. See Washington Sentencing Guidelines Comm'n, Adult Sentencing Manual 2008, III-76. The "elevation" in punishment on which Roswell pins its analysis is not in all circumstances real. And in any event, in each of these circumstances, the "elements" of the substantive crime remain the

---

[9] Another example of this type of offense is violation of a no-contact order, which is a misdemeanor unless the defendant has two or more prior convictions for the same crime. Roswell, 165 Wn.2d at 196 (discussing State v. Oster, 147 Wn.2d 141, 142-43, 52 P.3d 26 (2002)).

[10] Because the offense is elevated to a felony based upon a conviction of prior sex offense, and because prior sex offenses score as 3 points in the offender score, a person convicted of felony CMIP could not have score lower than 3.

same, save for the prior conviction "element." A recidivist fact which potentially alters the maximum permissible punishment from one year to five, is not fundamentally different from a recidivist element which actually alters the maximum punishment from 10 years to life without the possibility of parole.

In fact, the Legislature has expressly provided that the purpose of the additional conviction "element" is to elevate the penalty for the substantive crime: see RCW 9.68.090 ("Communication with a minor for immoral purposes – Penalties"). But there is no rational basis for classifying the punishment for recidivist criminals as an 'element' in certain circumstances and an 'aggravator' in others. The difference in classification, therefore, violates the equal protection clauses of the Fourteenth Amendment and Washington Constitution.

Division One concluded that there is no equal protection violation where the Legislature elects to classify the fact of a prior conviction as an element of certain offenses but as merely a sentencing factor for purposes of the POAA. State v. Langstead, 155 Wn.App. 448, 228 P.3d 799 (2010) (petition for review filed June 28, 2010). The decision distinguished Roswell, on the grounds that the substantive crime in that case was a

misdemeanor which was elevated to a felony by the fact of the prior conviction whereas Mr. Langstead's substantive crime was a felony in and of itself. Id. at 456.

This distinction is inapt. There is no constitutionally meaningful distinction that flows from labeling a person a felon as opposed to a misdemeanant. Rather, the equal protection analysis is properly focused on the difference in punishment. There is no rational basis to afford offenders such as Woodard less due process than offenders such as Roswell.

In Langstead, the court distinguished persons convicted of unlawful possession of a firearm in the first degree from persons sentenced as a persistent offender, on the grounds that possession of a firearm is unlawful only where there is a prior conviction. Id. However, this distinction is inconsistent with to the ultimate conclusion that "recidivists whose conduct is inherently culpable enough to incur a felony sanction are, as a group, rationally distinguishable from persons whose conduct is felonious only if preceded by a prior conviction for the same or similar offense." Id. at 456-57. A person convicted of unlawful possession of a firearm in the first degree must necessarily have a prior felony conviction. See RCW 9.41.040(1). Therefore, an offender convicted for

unlawful possession of a firearm in the first degree necessarily engaged in prior conduct that was "inherently culpable enough to incur a felony sanction." Yet that offender is entitled to have the prior conviction proven to a jury beyond a reasonable doubt.

Under the Fourteenth Amendment to the United States Constitution and article I, section 12 of the Washington Constitution, persons similarly situated with respect to the legitimate purpose of the law must receive like treatment. Bush v. Gore, 531 U.S. 98, 104-05, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000); City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); State v. Thorne, 129 Wn.2d 736, 770-71, 921 P.2d 514 (1994). A statutory classification that implicates physical liberty is subject to rational basis scrutiny unless the classification also affects a semi-suspect class. Thorne, 129 Wn.2d at 771. The Washington Supreme Court has held that "recidivist criminals are not a semi-suspect class," and therefore where an equal protection challenge is raised, the court will apply a "rational basis" test. Id.

> Under the rational basis test, a statute is constitutional if (1) the legislation applies alike to all persons within a designated class; (2) reasonable grounds exist for distinguishing between those who fall within the class and those who do not; and (3) the

> classification has a rational relationship to the purpose of the legislation. The classification must be "purely arbitrary" to overcome the strong presumption of constitutionality applicable here.

State v. Smith, 117 Wn.2d 117, 263, 279, 814 P.2d 652 (1991).

The Washington Supreme Court has described the purpose of the POAA as follows:

> to improve public safety by placing the most dangerous criminals in prison; reduce the number of serious, repeat offenders by tougher sentencing; set proper and simplified sentencing practices that both the victims and persistent offenders can understand; and restore public trust in our criminal justice system by directly involving the people in the process.

Thorne, 129 Wn.2d at 772.

The use of a prior conviction to elevate a substantive crime from a misdemeanor to a felony and the use of the same conviction to elevate a felony to an offense requiring a sentence of life without the possibility of parole share the purpose of punishing the recidivist criminal more harshly. But in the former instance, the prior conviction is called an "element" and must be proven to a jury beyond a reasonable doubt. In the latter circumstance, the prior conviction is called an "aggravator" and need only be found by a judge by a preponderance of the evidence.

So, for example, where a person previously convicted of rape in the first degree communicates with a minor for immoral purposes, in order to punish that person more harshly based on his recidivism, the State must prove the prior conviction to the jury beyond a reasonable doubt, even if the prior rape conviction is the person's I only felony and thus results in a "maximum sentence of only 12 months. But if the same individual commits the crime of rape of a child in the first degree, both the quantum of proof and to whom this proof must be submitted are altered – even though the purpose of imposing harsher punishment remains the same.

The legislative classification that permits this result is wholly arbitrary. Roswell concluded the recidivist fact in that case was an element because it defined the very illegality reasoning "if Roswell had had no prior felony sex offense convictions, he could not have been charged or convicted of *felony* communication with a minor for immoral purposes." (Italics in original.) 165 Wn.2d at 192. But as the Court recognized in the very next sentence, communicating with a minor for immoral purposes is a crime regardless of whether one has prior sex conviction or not, the prior offense merely alters the maximum punishment to which the person is subject. Id. So

too, first degree rape is a crime whether one has prior convictions for most serious sex offenses or not.

The recidivist fact here operates in the precise fashion as in Roswell. This Court should hold there is no basis for treating the prior conviction as an "element" in one instance – with the attendant due process safeguards afforded "elements" of a crime – and as an aggravator in another. The Court should strike Woodard's persistent offender sentence and remand for entry of a standard range sentence.

7. THE COURT'S FAILURE TO ENTER MANDATORY FINDINGS OF FACT FOLLOWING THE SUPPRESSION HEARINGS PRECLUDES MEANINGFUL APPELLATE REVIEW

a. Written findings are a mandatory and essential part of appellate review. When the court conducts a hearing on the admissibility of pretrial statements, it is required to file written findings explaining the factual findings and legal conclusions that form the basis for its decision. CrR 3.5.[11] The rule is mandatory. See e.g., State v. Krall, 125 Wn.2d 146, 881 P.2d 1040 (1994) (the

[11] CrR 3.5(b) provides:
Duty of Court To Make a Record. After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3)conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefor.

word "shall" in a statute is presumptively imperative and creates a duty); RAP 1.2(b) (when a word indicating "must" rather than "should" is used, the rule emphasizes that failure to perform act in timely way involves severe sanctions).

The purpose of written findings is not merely to assist, but to enable an appellate court's review of questions presented on appeal. State v. Head, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998); State v. Alvarez, 128 Wn.2d 1, 16, 904 P.2d 754 (1995). A court's oral ruling is "no more than [an] oral expression[ ] of the court's informal opinion at the time rendered." Head, 136 Wn.2d at 622. The oral opinion has no binding effect unless expressly incorporated into a final written judgment. Id. at 622.

When facts are not included in the written findings, the reviewing court presumes the omission means missing facts were not adequately proven. State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997). The "lack of an essential finding is presumed equivalent to a finding against the party with the burden of proof." In re Welfare of A.B., _Wn.2d _, 232 P.3d 1104, 1114 (2010).

Here, the court issued only a preliminary oral ruling following the CrR 3.5 hearing, and promised to conduct additional research

to determine whether Woodard had invoked his right to counsel before the police detective resumed questioning him. 1RP 195-99. The court noted that its oral ruling was "conditional" on further research. 1RP 198. The court never again mentioned the result of its research and made no further oral findings.

Additionally, the court re-opened the CrR 3.5 hearing in regards to another statement by Woodard in the middle of the trial. 3RP 82. This "re-opening" occurred over Woodard's objection. 3RP 72. Woodard argued that no additional information could be allowed because the State was required to identify the statements it wished to introduce before trial under CrR 3.5. Following this additional, mid-trial, CrR 3.5 hearing, the court ruled that Woodard's statement was voluntary and admissible without making specific or detailed findings. 3RP 88.

b. The failure to file findings of fact requires reversal. When the lack of written findings prejudices the defendant's right to appeal, reversal is the proper remedy. Head, 136 Wn.2d at 624; see State v. Dahl, 139 Wn.2d 678, 692-93, 990 P.2d 396 (1999) (Alexander J., dissenting) (grounds for finding prejudice include reliance on inadmissible evidence and lengthy delay in proceedings); State v. Witherspoon, 60 Wn.App. 569, 572, 805

P.2d 248 (1991) (late findings violate appearance of fairness and require reversal where remand is inadequate remedy based on lengthy delay and defendant's continued custody).

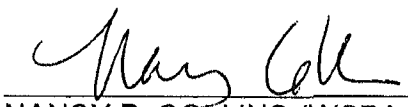
The court never issued full, complete, or formal findings orally or in writing, despite the mandatory nature of such findings under CrR 3.5. Woodard filed his notice of appeal months ago, but the court has not entered written findings of fact and conclusions of law. The court's failure to enter these mandatory findings impairs his ability to appeal his convictions and impedes his exercise of his constitutional right to appeal in all cases. Wash. Const. art. I, section 22.

E. CONCLUSION.

For the reasons stated above, Mr. Woodard respectfully asks this Court to reverse his convictions due to double jeopardy violations, flawed unanimity instructions, and taint from unduly prejudicial accusations about uncharged acts. Additionally, his sentence must be reversed based on the denial of equal protection of the laws and fundamental fairness.

DATED this 29th day of July 2010.

Respectfully submitted,



NANCY P. COLLINS (WSBA 28806)
Washington Appellate Project (91052)
Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 40293-9-II
v.	)	
	)	
GEORGE WOODARD,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF JULY, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] LIAM GOLDEN, DPA LORI SMITH, DPA LEWIS COUNTY PROSECUTING ATTORNEY 345 W MAIN ST FL 2 CHEHALIS, WA 98532	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] GEORGE WOODARD C/O SARAH WOODARD 15 MURRAY PL RD #13 ELMA, WA 98541	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 29TH DAY OF JULY, 2010.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

In re the Personal Restraint Petition of:	No. 45709-1-II
GEORGE P. WOODARD, Petitioner,	DECLARATION OF MAILING

Ms. Teri Bryant, paralegal for Sara I. Beigh, Senior Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On June 17, 2014, George Woodard was served with a copy of the State's **Response to Personal Restraint Petition** by depositing same in the United States Mail, postage pre-paid, to Petitioner at the name and address indicated below:

George P. Woodard, DOC #294146
Washington State Penitentiary
1414 North 13th Avenue
Walla Walla, WA 99362

DATED this 17th day of June, 2014, at Chehalis, Washington.

Teri Bryant

Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office

LEWIS COUNTY PROSECUTOR

June 17, 2014 - 11:14 AM

Transmittal Letter

Document Uploaded: prp2-457091-Response.pdf

Case Name:

Court of Appeals Case Number: 45709-1

Is this a Personal Restraint Petition? ■ Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: ____

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

■ Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Teresa L Bryant - Email: teri.bryant@lewiscountywa.gov